

No. 91-1657-CFX  
Status: GRANTED

Title: Charlene Leatherman, et al., Petitioners  
v.  
Tarrant County Narcotics Intelligence and  
Coordination Unit, et al.

Docketed:  
April 16, 1992

Court: United States Court of Appeals for  
the Fifth Circuit

Counsel for petitioner: Gladden, Don

Counsel for respondent: Ringle, Brett A., Olson, Wayne K.,  
Keith, Kevin

Entry	Date	Note	Proceedings and Orders
1	Apr 16 1992	G	Petition for writ of certiorari filed.
3	May 8 1992		Order extending time to file response to petition until June 1, 1992.
4	May 13 1992		DISTRIBUTED. May 29, 1992
6	May 13 1992	X	Brief of respondent Tarrant County Narcotics Intelligence, et al. in opposition filed.
9	May 14 1992		Brief of respondent City of Grapevine, Texas in opposition filed.
7	May 18 1992	D	Application (A91-873) order to vacate extension of time granted respondent City of Lake Worth to file brief in opposition by the Clerk, submitted to Justice Scalia.
8	May 19 1992		Application (A91-873) denied by Justice Scalia.
10	May 27 1992		Reply brief of petitioners Charlene Leatherman, et al. filed.
11	Jun 1 1992		Brief of respondent City of Lake Worth, TX in opposition filed.
13	Jun 3 1992		DISTRIBUTED. June 19, 1992
14	Jun 22 1992		Petition GRANTED. *****
15	Jul 6 1992		Record filed.
		*	Partial proceedings and briefs U. S. Court of Appeals for the Fifth Circuit.
16	Jul - 8 1992		Record filed.
		*	Original proceedings U. S. District Court, Northern District of Texas.
17	Jul 9 1992	G	Motion of petitioners to permit Richard Gladden to present oral argument pro hac vice filed.
19	Jul 28 1992		Order extending time to file brief of petitioner on the merits until August 21, 1992.
20	Jul 31 1992		Joint appendix filed.
21	Aug 20 1992		Brief of petitioners Charlene Leatherman, et al. filed.
22	Sep 4 1992		Motion of petitioners to permit Richard Gladden to present oral argument pro hac vice GRANTED.
24	Sep 11 1992		Order extending time to file brief of respondent on the merits until October 5, 1992.
25	Sep 18 1992		Brief amicus curiae of City of College Station, TX filed.
26	Oct 1 1992		Brief of respondent City of Lake Worth, Texas filed.
28	Oct 2 1992		Brief of respondent City of Grapevine, Texas filed.
31	Oct 2 1992		Brief amici curiae of Texas Municipal League, et al. filed.
27	Oct 5 1992		Brief of respondents Tarrant County Narcotics Intelligence,

Entry	Date	Note	Proceedings and Orders
-----			
		et al. filed.	
29	Oct 5 1992	Brief amici curiae of Texas, et al. filed.	
30	Oct 5 1992	Brief amici curiae of National Institute of Municipal Law Officers, et al. filed.	
32	Oct 26 1992	D Application (A92-338) extension of time to file reply brief on the merits from November 4, 1992 to and including November 18, 1992, submitted to Justice Scalia.	
33	Oct 27 1992	Application (A92-338) denied by Justice Scalia.	
34	Nov 4 1992	Reply brief of petitioners filed.	
36	Nov 23 1992	CIRCULATED.	
37	Jan 12 1993	ARGUED.	
35	Nov 20 1993	SET FOR ARGUMENT TUESDAY, JANUARY 12, 1993. (3RD CASE).	



9 1 - 1 6 5 7

Supreme Court, U.S.  
FILED

APR 16 1992

NO. \_\_\_\_\_

~~OFFICE OF THE CLERK~~

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991

\_\_\_\_\_  
Charlene LEATHERMAN, et al.,

Petitioners

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,

Respondents

\_\_\_\_\_  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Don Gladden\*

&

Richard Gladden

P. O. Box 50686

Fort Worth, Texas 76105

817-531-3667

April, 1992

\*Counsel of Record

#### QUESTIONS PRESENTED

1. On a complaint brought pursuant to 42 U.S.C. Section 1983 alleging liability against a local governmental entity for constitutional violations caused by its failure to adequately train and supervise its police officers, is dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure due to the complaint's failure to satisfy a "heightened pleading" requirement:

A) prohibited by the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure; or

B) prohibited by the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right?

## LIST OF PARTIES

### Petitioners from Judgment Below<sup>1</sup>

Charlene Leatherman and  
Kenneth Leatherman,  
Individually and as Next of Friend of  
Travis Leatherman;  
Gerald Andert;  
Kevin Lealos and Jerri Lealos,  
Individually and as Next of Friends of  
Travor Lealos and  
Shane Lealos;  
Pat Lealos;  
Donald Andert

### Respondents

The Tarrant County Narcotics Intelligence  
and Coordination Unit;  
Tim Curry, in his Official Capacity as  
Director of the Tarrant County Narcotics  
and Coordination Unit of Tarrant County,  
Texas;  
Don Carpenter, in his Official Capacity  
as Sheriff of Tarrant County, Texas;  
City of Lake Worth, Texas;  
City of Grapevine, Texas

---

<sup>1</sup>Lucy Andert, formerly a Plaintiff in  
the District Court, is deceased. The  
executors of Mrs. Andert's estate,  
through their counsel, have informed her  
counsel in this case that they do not  
desire to proceed with litigation of her  
claims herein.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	vi
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTES AND RULES INVOLVED .....	3
STATEMENT OF THE CASE .....	3
REASONS FOR GRANTING THE WRIT:	
I. The question of whether a "heightened pleading" require- ment may properly be applied to complaints brought pursuant to 42 U.S.C. Section 1983 represents an important question which has not been, but should be, decided by the Supreme Court. ....	8
II. The Fifth Circuit's decision to apply a "heightened pleading" requirement to complaints alleging local governmental liability under 42 U.S.C. Section 1983 directly conflicts with the decisional law of the United States Court of Appeals for the Ninth Circuit, which	

	Page
has expressly rejected application of the "heightened pleading" requirement in the local governmental liability context. ....	11
III. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in <u>Conley v. Gibson</u> , 355 U.S. 41 (1957). ...	14
IV. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right." ....	17
CONCLUSION .....	18
APPENDICES:	
<u>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit</u> , 954 F.2d 1054 (5th Cir. 1992) .....	1a
<u>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit</u> , 755 F.Supp 726 (N.D. Tex. 1991) .....	25a

# STATUTES AND RULES INVOLVED:

Civil Rights Act of 1871, 42 U.S.C. Section 1983 .....	55a
Rule 8 of the Federal Rules of Civil Procedure .....	55a
The Rules Enabling Act, 28 U.S.C. Section 2072 .....	56a

# TABLE OF AUTHORITIES

Cases	Page
<u>Conley v. Gibson</u> , 355 U.S. 41 (1957) .....	iv,14,16
<u>Dioguardi v. Durning</u> , 139 F.2d 774 (2nd Cir. 1944) .....	16
<u>Elliott v. Thomas</u> , 937 F.2d 338 (7th Cir. 1991), <u>cert. denied</u> <u>sub nom. Propst v. Weir</u> , 502 U.S. ___, 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) .....	13
<u>Evans v. McKay</u> , 869 F.2d 1341 (9th Cir. 1989) .....	12
<u>Karim-Panahi v. Los Angeles Police Dept.</u> , 839 F.2d 621 (9th Cir. 1988) .....	12
<u>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit</u> , 755 F.Supp. 726 (N.D. Tex. 1991), <u>aff'd</u> , 954 F.2d 1054 (5th Cir. 1992) ..	passim
<u>Nichols v. McCormick</u> , 929 F.2d 507 (9th Cir. 1991) .....	12
<u>Pavelic &amp; LeFlore v. Marvel Entertainment Group</u> , 493 U.S. 120 (1989) .....	15
<u>Radovich v. National Football League</u> , 352 U.S. 445 (1957) .....	18
<u>Shah v. County of Los Angeles</u> , 797 F.2d 743 (9th Cir. 1986) .....	12

<u>Siegart v. Gilley</u> , 500 U.S. ___, 111 S.Ct. 1789 (1991) .....	8,9
<u>Streetman v. Jordon</u> , 918 F.2d 555 (5th Cir. 1990) .....	18
<u>Statutes, Codes and Constitutional Provisions:</u>	
28 U.S.C. Section 1254(1) .....	2
28 U.S.C. Section 2072 .....	i,iv,v,3,17
42 U.S.C. Section 1983 .....	passim
Rule 8 of the Federal Rules of Civil Procedure .....	i,iv,v,3,13,15
Rule 9 of the Federal Rules of Civil Procedure .....	13
Rule 12 of the Federal Rules of Civil Procedure .....	i,6
Rule 56 of the Federal Rules of Civil Procedure .....	5,13
Fourth Amendment to the United States Constitution .....	3



IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

---

NO. \_\_\_\_\_

---

Charlene LEATHERMAN, et al.,  
Petitioners

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,  
Respondents

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

---

TO THE HONORABLE, THE CHIEF JUSTICE OF  
THE UNITED STATES AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE  
UNITED STATES:

Petitioner herein prays that a Writ of  
Certiorari issue to the United States  
Court of Appeals for the Fifth Circuit to  
review that Court's February 28, 1992  
Judgment and Opinion in this proceeding.

#### OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered February 28, 1992, and from which review is sought, are reported at 954 F.2d 1054 (5th Cir. 1992), and are attached in the Appendix to this Petition at page 1a.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas entered January 22, 1991, and from which Petitioners appealed, are reported at 755 F.Supp. 726 (N.D. Tex. 1991), and are attached in the Appendix of this Petition at page 25a.

#### JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought on February 28, 1992. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

#### STATUTES AND RULES INVOLVED

This case arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the Questions Presented involve another statute, the Rules Enabling Act, 28 U.S.C. Section 2072, and Rule 8 of the Federal Rules of Civil Procedure. These statutes and rule are reprinted in the Appendix to this Petition at pages 55a-56a.

#### STATEMENT OF THE CASE

This case arises out of two searches of private residential dwellings conducted by law enforcement officers in Tarrant County, Texas, on January 30, and May 30, 1989. The Petitioners herein alleged in their First Amended Complaint, inter alia, that the searches in question were carried out in an unconstitutional manner in violation of the Fourth

Amendment, and that the Respondent local governmental entities, through their respective failures to adequately train and supervise their police personnel, are liable to Petitioners under 42 U.S.C. Section 1983. After all Respondents had filed their answers to Petitioners' First Amended Complaint, Respondents TCNICU and Tarrant County on April 17, 1990 filed their second "Motion to Dismiss or for Summary Judgment."

On June 7, 1990 Respondents TCNICU and Tarrant County filed a motion for a protective order seeking to insulate them from discovery sought by Petitioners in their "Amended Request for Production of Documents." (R.II,249). On June 18, 1990, Petitioners filed their response to Respondents' TCNICU and Tarrant County's Motion to Dismiss or for Summary Judgment, and expressly requested therein

that the District Court defer consideration of the Respondents' motion for summary judgment, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, on the ground that the discovery sought by Petitioners in their Amended Request for Production of Documents, to which the Respondents objected, would provide facts essential to their opposition to Respondents' motion for summary judgment. (R.II, 362,390-391). On July 20, 1990 Petitioners filed a motion for a hearing on Respondents TCNICU and Tarrant County's Motion for a Protective Order, and requested therein that the District Court set an early date for the hearing on Respondents' motion for protective order.

On December 31, 1990, the District Court granted Respondents' TCNICU and

Tarrant County's Motion for a Protective Order and denied Petitioners' request for a hearing on that motion. (R.II,453). On January 22, 1991, barely three weeks later, the District Court granted Respondents TCNICU and Tarrant County's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that Petitioners' First Amended Complaint did not satisfy the Fifth Circuit's "heightened pleading" requirement. In the alternative, the District Court granted Respondents TCNICU and Tarrant County's motion for summary judgment, and thereafter sua sponte dismissed and granted summary judgment in favor of Respondents City of Grapevine and City of Lake Worth with respect to the remainder of the Petitioners' claims. (R.II,457).

On appeal, the United States Court of Appeals for the Fifth Circuit, in a majority opinion written by the Honorable Irving L. Goldberg, affirmed. Pet. App. at page 2a, 954 F.2d at 1055. The majority opinion for the Court of Appeals rested its decision to affirm solely on the ground that the Petitioners' First Amended Complaint had failed to satisfy the Fifth Circuit's "heightened pleading" requirement. See Pet. App. at page 14a n.6, 954 F.2d at 1058 n.6.

In a specially concurring opinion, also written by Judge Goldberg, Judge Goldberg noted that he was "impressed by the wealth of authority plaintiffs cite in support of their position" challenging the heightened pleading requirement, Pet. App. at page 23a-24a, 954 F.2d at 1061, but noted further that in light of preexisting Fifth Circuit precedent, he



found himself "constrained to obey the command of the heightened pleading requirement" in the Petitioners' case. Ibid.

The present Petition for Writ of Certiorari followed.

#### REASONS FOR GRANTING THE WRIT

- I. The question of whether a "heightened pleading" requirement may properly be applied to complaints brought pursuant to 42 U.S.C. Section 1983 represents an important question which has not been, but should be, decided by the Supreme Court.

As Judge Goldberg has noted in his specially concurring opinion in the Court of Appeals, Pet. App. at page 24a n.3, 954 F.2d at 1061 n.3, it appeared that the Supreme Court would determine the validity of the "heightened pleading" requirement when it granted certiorari last Term in Siegart v. Gilley, 500 U.S. \_\_\_, 111 S.Ct. 1789 (1991). The Supreme

Court, however, did not reach the specific question in Siegart concerning the "heightened pleading" requirement, but affirmed the lower court decision on other grounds. While the Questions Presented in the present petition involve an application of the "heightened pleading" requirement in the context of local governmental liability under Section 1983, as opposed to the context in Siegart wherein an individual capacity defendant had asserted a qualified immunity defense, the validity of the Fifth Circuit's application of the heightened pleading requirement in the present case represents a question no less important than the "heightened pleading" question considered, but not decided, in Siegart v. Gilley. The extension of the heightened pleading requirement to local governmental



liability allegations under Section 1983 has led to sharp criticism in numerous law review articles, see Pet. App. at pages 16a-17a, 954 F.2d at 1059 (Goldberg, J., concurring) (listing articles), and, as Judge Goldberg observes in his special concurrence, its application "has generated great debate, resulting in what appears to be a Circuit split on the issue." Pet. App. at page 23a, 954 F.2d at 1061. The "circuit split" Judge Goldberg has noted represents a second reason why this petition should be granted, which Petitioners have set out below.

II. The Fifth Circuit's decision to apply a "heightened pleading" requirement to complaints alleging local governmental liability under 42 U.S.C. Section 1983 directly conflicts with the decisional law of the United States Court of Appeals for the Ninth Circuit, which has expressly rejected application of the "heightened pleading" requirement in the local governmental liability context.

The United States Court of Appeals for the Ninth Circuit has expressly refused to apply a "heightened pleading" requirement to Section 1983 complaints alleging local governmental liability. As Judge Goldberg notes, Pet. App. at page 18a, 954 F.2d at 1059 (concurring opinion), the Ninth Circuit has held that:

"a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officer's conduct conformed to official policy, custom or practice.'"

Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988) [quoting Shah v. County of Los Angeles, 797 F.2d 743, 747 (9th Cir. 1986)]; accord, Evans v. McKay, 869 F.2d 1341, 1349 (9th Cir. 1989).

Absent en banc reconsideration of Shah v. County of Los Angeles, which does not appear likely, the holding quoted above will remain the decisional law of the Ninth Circuit. In the Ninth Circuit, "[a] panel not sitting en banc may not overturn Ninth Circuit precedent." Nichols v. McCormick, 929 F.2d 507, 510 n.5 (9th Cir. 1991).

The apparent "circuit split" between the Fifth and Ninth Circuits on the "heightened pleading" issue, noted by Judge Goldberg, Pet. App. at page 23a, 954 F.2d at 1061 (concurring opinion), also appears to involve the Seventh

Circuit. In Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied sub. nom., Propst v. Weir, 502 U.S. \_\_\_, 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955), the Seventh Circuit "deprecated" the application of the heightened pleading requirement because, in that court's view, "it appear[ed] to conflict with rules 8, 9(b), and 56 of the Federal Rules of Civil Procedure." Pet.App. at pages 19a-20a, 954 F.2d at 1060 (concurring opinion).

Given the large number of actions filed in the Fifth Circuit under 42 U.S.C. Section 1983, and the apparent "circuit split" on the heightened pleading requirement issue, Pet. App. at page 23a, 954 F.2d at 1061 (concurring opinion), the circuit split in question constitutes an intolerable one which should be resolved by the Supreme Court.

III. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957).

Dismissal of a complaint for failure to state a claim upon which relief can be granted, due to an alleged failure "to set forth specific facts," is governed by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957). In Conley the respondents argued, like the Respondents in the instant case have successfully argued below, that the complaint they challenged "failed to set forth specific facts to support its general allegations." Id., 355 U.S. at 47. The Supreme Court rejected this challenge in Conley with the following holding:

"[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [quoting Rule 8(a)(2)] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id., 355 U.S. at 47.

The Fifth Circuit's decision to apply a "heightened pleading" requirement to this and other similar cases directly conflicts with the system of "notice" pleading. The Fifth Circuit, like all other Courts of Appeals, is obliged to "give the Federal Rules of Civil Procedure their plain meaning," Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989), and "to apply the text, not to improve upon it." Id., 493 U.S. at 126.

The Reporter of the Supreme Court's Committee on the Rules of Civil Procedure which drafted Rule 8, later sitting as an



appellate judge, has confirmed in a decision cited favorably by the Supreme Court in Conley v. Gibson, 335 U.S. at 46 n.5, that "there is no pleading requirement [under the Federal Rules of Civil Procedure] of 'stating facts sufficient to constitute a cause of action.'" Dioquardi v. Durning, 139 F.2d 774, 775 (2nd Cir. 1944) (Opinion per Charles E. Clark, J.). The Fifth Circuit's ill-advised, deliberate and systemic departure from the principle of "notice" pleading adopted by the Federal Rules of Civil Procedure and affirmed by the Supreme Court in Conley v. Gibson, warrants corrective action by the Supreme Court without further delay.

IV. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right."

The Supreme Court has never approved, through the procedures mandated by the Rules Enabling Act, 28 U.S.C. Section 2072 (or otherwise), the sort of departure from "notice" pleading which is entailed in the Fifth Circuit's selective application of a "heightened pleading" requirement solely to civil rights cases brought under 42 U.S.C. Section 1983. Even had the Supreme Court approved such a departure, adoption of a "heightened pleading" requirement to authorize dismissal of a complaint prior to discovery would directly violate 28 U.S.C. Section 2072(b), which prohibits adoption of rules of practice and

procedure which "abridge, enlarge, or modify any substantive right."

The Fifth Circuit has candidly acknowledged that its application of the "heightened pleading" requirement results in the dismissal "of some meritorious claims." Streetman v. Jordon, 918 F.2d 555, 557 n.2 (5th Cir. 1990). When extended to apply to the local governmental entity context, the "heightened pleading" requirement impermissibly, and intolerably, "add[s] requirements to burden the private litigant beyond what is specifically set forth by Congress." Radovich v. National Football League, 352 U.S. 445, 454 (1957) (rejecting "technical objections" to Sherman Act complaint).

#### CONCLUSION

For the foregoing reasons, Petitioners

pray that a Writ of Certiorari issue to review the February 28, 1992 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

  
DON GLADDEN\*

&  
RICHARD GLADDEN  
Attorneys at Law  
P. O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

ATTORNEYS FOR PETITIONERS

\*Counsel of Record



1a

Charlene LEATHERMAN, et al.,  
Plaintiffs-Appellants,

V.

TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION  
UNIT, et al.,  
Defendants-Appellees

No. 91-1215

United States Court of Appeals,  
Fifth Circuit.

Feb. 28, 1992

---

Appeal from the United States District  
Court for the Northern District of Texas.

Before GOLDBERG, SMITH, and DUHE,  
Circuit Judges.

GOLDBERG, Circuit Judge:

After police shot and killed their two dogs during the execution of a search warrant, plaintiffs brought this 1983 action against the municipal defendants employing the police officers involved. They alleged that the municipalities had failed to adequately train their officers, and that such failure amounted to a municipal policy. The district court, 755 F. Supp. 726 (N.D.Tex.1991), dismissed the complaint because it did not satisfy this circuit's "heightened pleading requirement." Under the heightened pleading standard, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including "detailed facts supporting the contention that [a] plea of immunity cannot be sustained," *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir.1985), and, in cases like this one, facts that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible. *Palmer v. City of San Antonio*, 810 F.2d 514, 517 (5th Cir.1987). Because plaintiffs complaint does not satisfy the heightened pleading requirement, we affirm.

### *Dog Day Afternoon*

This civil rights case arose out of two separate incidents involving the execution of search warrants by law enforcement officers with the Tarrant County Narcotics Intelligence and Coordination Unit. One incident involved Charlene Leatherman, her son Travis, and her two dogs, Shakespeare and Ninja. Ms. Leatherman and Travis were driving in Fort Worth when they were suddenly stopped by police cars. Police officers surrounded the two of them, shouting instructions and threatening to shoot them. The officers informed Ms. Leatherman that other law enforcement officers were in the process of searching her residence. The officers also informed her that the search team had shot and killed their two dogs. Ms. Leatherman and Travis returned to their home to find Shakespeare lying dead some twenty-five feet from the front door. He had been shot three times, once in the stomach, once in the leg, and once in the head. Ninja was lying in a pool of blood on the bed in the master bedroom. He had been shot in the head at

close range, evidently with a shotgun, and brain matter was splattered across the bed, against the wall, and on the floor around the bed. The officers found nothing in the home relevant to their investigation. Rather than departing with dispatch, they proceeded to lounge on the front lawn of the Leatherman home for over an hour, drinking, smoking, talking, and laughing, apparently celebrating their seemingly unbridled power.

The other incident alleged in plaintiff's amended complaint involved a police raid of the home of Gerald Andert pursuant to a search warrant. The warrant was issued on the basis that police officers had smelled odors associated with the manufacture of amphetamines emanating from the Andert home. At the time of the raid, Andert, a sixty-four year old grandfather, was at home with his family mourning the death of his wife; she had died after a three year battle with cancer. Without knocking or identifying themselves, the officers burst into the home and, without provocation, began beating Andert. First, an unidentified officer knocked him

backwards. When Andert turned, he was greeted by two swift blows to the head inflicted by a club, presumably of the billy-style. His head wound would require eleven stitches. Other officers, in the meantime, shouted obscenities at the family members, who were still unaware of the intruders' identities. At gunpoint, the officers forced the family members to lie face down on the floor. The officers did not relent: they continued to insult the residents and threatened to harm them. After searching the residence for one and one-half hours and finding nothing in the residence related to narcotics activity, the officers finally left.

Plaintiffs sued the Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"), Tim Curry (in his official capacity as director of that unit), Tarrant County, Don Carpenter (sheriff of Tarrant County), the City of Lake Worth, Texas, and the City of Grapevine, Texas, in connection with these two incidents. Their amended complaint<sup>1</sup>

---

<sup>1</sup>Plaintiffs' original complaint only referenced the incident involving the Leathermans and their two dogs. Plaintiffs amended their complaint to include the Andert incident and



alleged generally that the municipalities failed to formulate and implement an adequate policy to train its officers on the proper manner to execute search warrants and respond when confronted by family dogs. The allegations were of the "boilerplate" variety, alleging no underlying facts other than the events described above to support the assertions that the municipalities had adopted policies, customs, and practices condoning the conduct of the officers involved.<sup>2</sup> The complaint did not name any of the officers in their individual

---

add the City of Grapevine and City of Lake Worth as defendants.

<sup>2</sup>The amended complaint did allege that one of the officers, in response to Ms. Leatherman's inquiry as to why the officers had shot the dogs, responded that it was "standard procedure." At most, that admission by the officer establishes that the municipalities had adopted a standard procedure for neutralizing dogs encountered during the execution of a search warrant. It does not establish that the municipalities had a policy of killing all dogs during a search, or that the municipalities failed to adequately train officers in appropriately responding to animals encountered during a search. In other words, the admission only suggests the existence of a municipal policy; it does not convey the policy's content. We also note that the allegation concerning the admission was not substantiated in Ms. Leatherman's affidavit tendered in opposition to defendants' motion.

capacities as defendants.<sup>3</sup> TCNICU, Tim Curry, and Don Carpenter moved the district court to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6), or in the alternative, to enter summary judgment in their favor pursuant to Fed. R. Civ.P. 56. They argued first that the complaint did not adequately allege facts under this circuit's heightened pleading standard establishing that the municipality adopted a policy or custom countenancing the police conduct or that its failure to train amounted to deliberate indifference to the rights of the plaintiffs. Alternatively, the movants sought summary judgment, arguing that the evidence would fall short of establishing the necessary elements of municipal liability.

---

<sup>3</sup>The complaint also alleged that the municipalities engaged in a custom and practice of preparing and causing the issuance of search warrants for residences based solely on the detection of odors associated with illegal drug manufacturing. The district court held that such a practice does not amount to a constitutional violation. See Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 368-69, 92 L.Ed. 436 (1948); United States v. McKeever, 906 F.2d 129, 132 (5th Cir.1990), cert.denied, \_\_\_ U.S. \_\_\_, 111 S. Ct. 790, 112 L.Ed.2d 852 (1991).

The district court granted the motion and dismissed all of plaintiffs' claims against all of the defendants, movants and nonmovants alike. The district court held that the complaint did not satisfy the heightened pleading standard, and that in any event, the evidence in the record demonstrated that all defendants were entitled to summary judgment as a matter of law. On appeal, plaintiffs urge this court to abandon the heightened pleading requirement, apparently conceding that their complaint does not satisfy that standard. Putting aside any pleading deficiencies, they also challenge the propriety of summary judgment. Finally, they contend that the district court's *sua sponte* dismissal of their claims against the nonmovants, defendants City of Grapevine and City of Lake Worth, was premature because the district court did not provide them with notice that it was contemplating dismissing their claims against those nonmoving defendants.

*All Bark, No Bite*

In *Elliott v. Perez*, 751 F2d 1472 (5th Cir.1985), this circuit adopted the heightened pleading requirement for cases against state actors in their individual capacities. Reasoning that the doctrine of immunity should accord the defendant-official not only immunity from liability, but also immunity from defending against the lawsuit, *id.* at 1477-78 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17, 102 S.Ct 2727, 2737-38, 73 L.Ed.2d 396 (1982)), the *Elliott* court held that:

In cases against government officials involving the likely defense of qualified immunity we require of trial judges that they demand that the plaintiff's complaint state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.

*Id.* at 1473

Since *Elliott*, this circuit has, without fail, applied the heightened pleading requirement in cases in which the defendant-official can raise the immunity



defense. *E.g.*, *Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir.1986); *Geter v. Fortenberry*, 849 F.2d 1550, 1553-54 (5th Cir.1988); *Streetman v. Jordan*, 918 F.2d 555, 557 (5th Cir.1990); *Vinson v. Heckmann*, 940 F.2d 114, 116 (5th Cir.1991); *Husband v. Bryan*, 946 F.2d 27, 30 (5th Cir.1991). We have written that "pleadings, replete with ...conclusory statements, do not defeat the officers' qualified immunity defense." *Streetman*, 918 F.2d at 557. Other circuits have similarly applied the heightened pleading requirement. For a collection of cases, see Schwartz and Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees*, Vol. I, sec. 1.6 n. 106 (1991).

In *Palmer v. City of San Antonio*, 810 F.2d 514, 516-17 (5th Cir.1987), a panel of this court extended the heightened pleading requirement into the municipal liability context. The court assumed, *sub silentio*, that the heightened pleading requirement logically applied not only in cases against defendant-officials, but in all section 1983 cases, including cases brought against a

municipality. The *Palmer* court did not explain why the heightened pleading requirement should be extended to defendant-municipalities, considering that municipalities cannot claim the immunity defense. *See Owen v. City of Independence, Mo.*, 445 U.S.622, 650, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980) (rejecting "a construction of section 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violation"). A later panel of this court suggested that:

[i]n view of the enormous expense involved today in litigation, ... the heavy cost of responding to even a baseless legal action, and of Rule 11's new language requiring reasonable inquiry into the facts of the case by an attorney *before* he brings an action, applying the stated rule to all section 1983 actions has much to recommend it.

*Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir.1989), *cert denied*, 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d

114 (1989).<sup>4</sup> Thus, under *Elliott and Palmer*, the heightened pleading requirement governs all section 1983 complaints brought in this circuit: If the complaint is all bark and no bite, a district court is constrained to dismiss it even before opening discovery.

With the heightened pleading requirement as our guide, we turn to the particulars of this case. Quite plainly, plaintiffs' complaint falls short of alleging the requisite facts to establish a policy of inadequate training. Where, as here, a lawsuit brought against a municipality is predicated on inadequate training of its police officers, see generally *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct.1197, 1205-06, 103 L.Ed.2d 412 (1989), this circuit has cautioned that "to make such a showing in such a case, there would have to be demonstrated 'at least a pattern of similar incidents

---

<sup>4</sup>The *Rodriguez* court indicated that it had no need in that case to "go so far" as extending the heightened pleading requirement in the municipal liability context. *Id.* Apparently, the *Rodriguez* panel was unaware that the *Palmer* panel had already gone that far.

in which the citizens were injured' ...[in order] to establish the official policy requisite to municipal liability under section 1983." *Rodriguez*, 871 F.2d at 554-55 (citing *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir.1983), cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984)); see also *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy..."). While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training.

Although we are troubled by the absence of notice preceding the district court's *sua sponte* dismissal of the claims against the nonmovants,<sup>5</sup>

---

<sup>5</sup>Plaintiffs did know that the court was evaluating the adequacy of their complaint, if not the entire complaint, at

defendant City of Grapevine and City of Lake Worth, we nevertheless affirm the dismissal of those claims as well. Plaintiffs do not contend in this court that they are prepared to allege specific facts in an amended complaint so as to render it in compliance with our heightened pleading requirement. We conclude, therefore, that the district court's failure to notify plaintiffs of its intention to dismiss the claims against the nonmovants, in the context of this case, was harmless. *C.f. Powell v. United States*, 849 F.2d 1576, 1580-82 (5th Cir.1988) (applying harmless error test to the notice requirement under Federal Rule of Civil Procedure 56 [summary judgment]).<sup>6</sup>

The judgment of the district court is **AFFIRMED**.

---

least that portion pertaining to the claims against the moving defendants.

<sup>6</sup>The district court ruled, in the alternative, that summary judgment was appropriate and that no further discovery was necessary. Because we hold that the district court properly dismissed the complaints based on the insufficiency of the allegations, we need not reach the other issues raised.

GOLDBERG, Circuit Judge, concurring specially.

Plaintiffs make no bones about it. Nowhere do they contend that their complaint satisfies the heightened pleading requirement. Instead, they urge this panel to abandon the requirement in favor of the traditional notice pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102-03, 2 L.Ed.2d 80 (1957). I write further to articulate and comment upon their position.

*These Dogs Want Their Day*

Plaintiffs argue that the heightened pleading requirement finds no support in the Federal Rules of Civil Procedure or in Supreme Court precedent.<sup>1</sup>

---

<sup>1</sup>At least one member of the Supreme Court, Justice Kennedy, has expressed approval of the heightened pleading requirement in the immunity context, though he believes that the plaintiff needs to make specific factual allegations only after the defendant has raised the qualified immunity defense.

The heightened pleading standard is a departure from the usual pleading requirement of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive



They direct our attention to a plethora of articles and essays by persuasive commentators who champion this view. *See, e.g.,* Schwartz and Kirklin, *Section 1983 Litigation: Claims, Defense and Fees*, Vol.I, sec. 1.6, at p. 20 (1991) ("[t]here are pragmatic and theoretical difficulties with the heightened pleading requirement"); Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirement in Civil Rights Litigation*, 31 Wm. & Mary L.Rev. 935, 949 (1990) (arguing that the creation of the heightened pleading requirement has no "direct legal support"); Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L.Rev. 270, 299 (1989)

---

discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Upon the assertion of a qualified immunity defense the plaintiff must put forward specific nonconclusory factual allegations ... or face dismissal.

*Siegert v. Gilley*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991) (Kennedy, J., concurring).

("[f]ederal courts may lack the requisite authority to demand more stringent pleading" in civil rights cases); Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L.Rev. 597, 657 n. 235 (1989) ("[i]t is not obvious that the courts have authority to impose [the heightened pleading] requirement"); Saalman, *Rule 11 in the Constitutional Case*, 63 Notre Dame L.Rev. 788, 808-09 (1988) ("neither the Federal Rules nor the holdings of the Supreme Court interpreting those Rules provide for such a disparity of treatment" between section 1983 cases and all other lawsuits); Wingate, *A Special Pleading Rule for Civil rights Complaints: A Step Forward or a Set Back?*, 49 Mo.L.Rev. 677, 683 (1984) (arguing that there is no "direct authority for the [heightened pleading] rule"); Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 Cornell L.Rev. 390, 418 n.175 (1980) (asserting that "[t]he Supreme Court has never approved such an exception to federal notice pleading").

Plaintiffs also observe that some circuits have



declined to embrace the heightened pleading requirement. The Ninth Circuit, for example, has held that the heightened pleading requirement applies neither in the defendant-official context, *Bergquist v. County of Cochise*, 806 F.2d 1364, 1367, (9th Cir.1986), nor in the municipal liability arena. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir.1988). That court has stated squarely that our decision in *Elliott v. Perez* "is not the law in this circuit," *Bergquist*, 806 F.2d at 1367, and that "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officer's conduct conformed to official policy, custom, or practice.'" *Karim-Panahi*, 839 F.2d at 624 (quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir.1986)). In *Branch v. Tunnell*, however, a later panel of the Ninth Circuit "adopt[ed] a heightened pleading standard in cases in which subjective intent is an element of a constitutional

tort action." 937 F.2d 1382, 1386 (9th Cir.1991).<sup>2</sup>

The Seventh Circuit has expressed skepticism of the heightened pleading requirement as well. Echoing the concerns voiced by our Judge Higginbotham in his specially concurring opinion in *Elliott v. Perez*, 751 F.2d at 1482-83, the Seventh Circuit "deprecate[d] the expression 'heightened pleading requirement'" because, in the court's view, it appears to conflict with rules 8, 9(b), and 56 of the Federal Rules of Civil Procedure. Judge Easterbrook, writing for the court, explained:

It is better, we think, to recognize that official immunity is an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rule 8 and 9(b). A possibility that the defendants will claim immunity does not require the

---

<sup>2</sup>The *Branch* court did not endeavor to reconcile its holding with the earlier Ninth Circuit decision in *Bergquist*. It relied primarily on the District of Columbia Circuit's decision in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C.Cir.1990), affirmed on other grounds, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), and Justice Kennedy's concurring opinion affirming the District of Columbia Circuit's decision. 111 S.Ct. at 1795 (Kennedy, J., concurring).

plaintiff to anticipate and pled around that defense. *Gomez v. Toledo*, 446 U.S. 625 (1980). Defendants assert immunity by pleading it in the answer and moving for summary judgment [under Rule 56].

*Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir.1991), cert. denied, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed.2d \_\_\_, 1991 WL 277210 (Jan. 27, 1992).

Plaintiffs also contend that even if the heightened pleading requirement makes sense in the context of cases like *Elliott v. Perez*, which involve the likely defense of immunity, the extension of the heightened pleading requirement to complaints against municipalities, as in this case, is unwarranted. The rationale underlying the heightened pleading requirement----providing defendant-officials with immunity from defending a lawsuit----carries no force in the municipality context because defendant-municipalities, unlike defendant-officials, cannot claim an immunity defense. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673

(1980). To the extent that the heightened pleading requirement is on tenuous soil when immunity is available, *Elliott v. Perez*, 751 F.2d at 1483 (Higginbotham, J., concurring), plaintiffs contend that even less reason exists to fashion an exception to the notice pleading requirement when the defendant enjoys no immunity at all. Municipalities, plaintiffs argue, should not be afforded the benefit of a heightened pleading requirement; like any other defendant in any other case, municipalities should defend an action if the complaint satisfies the traditional, more lenient, notice pleading requirements set forth in *Conley v. Gibson*.

There is something to be said for this argument. The rationale given by the *Rodriguez* court for extending the heightened pleading requirement into the municipal liability arena----the expense of litigation and Rule 11's demand for reasonable inquiry into the facts before bringing an action----is not unique to the section 1983 domain. After all, every lawsuit, not just section 1983 cases, represents

a potentially expensive proposition for the defendant, and Rule 11 governs every civil case, no matter what the subject matter of the suit. By adopting notice pleading and not fact pleading, Congress has struck the balance in favor of plaintiffs: "[N]otice pleading concepts rest on acceptance of the idea that one may sue now and discover later...." *Elliott v. Perez*, 751 F.2d at 1482-83 (Higginbotham, J., concurring). Unless this court----or Congress, rather----intends to abandon notice pleading altogether, it is difficult to justify singling out section 1983 municipality cases over *all* other cases for application of the heightened pleading requirement. This is especially true in light of the challenges encountered when attempting to establish municipal liability. Plaintiffs must affirmatively prove a policy of inadequate training, yet the heightened pleading requirement forecloses any discovery which might uncover the evidence supporting their general allegation. Of course, we might expect that the municipality would have exclusive access to the information necessary

to prove a policy, such as statistics, internal policy manuals, confidential memoranda and the like. As one source observes, the heightened pleading requirement "places an unrealistic burden on civil rights claimants who might have legitimate claims against municipalities, yet are foreclosed by the specific fact-pleading rule from obtaining the necessary information from the municipality through discovery." Schwartz and Kirklin, *supra* Vol. I, sec. 7.12, at p. 393.

*Let Sleeping Dogs Lie*

The heightened pleading requirement has its proponents and its critics. Its application to section 1983 suits has generated great debate, resulting in what appears to be a circuit split on the issue. Although I have taken the time to lay out the competing arguments and am impressed by the wealth of authority plaintiffs cite in support of their position, I agree that we, as a panel of this court, must politely decline their invitation to reexamine the wisdom of this circuit's heightened pleading requirement. Until such a time as the en banc



court sees fit to reconsider *Elliott* or, more specifically, *Palmer*, and in the absence of an intervening Supreme Court decision undermining our settled precedent,<sup>3</sup> I find myself constrained to obey the command of the heightened pleading requirement.<sup>4</sup>

---

<sup>3</sup>It appeared that the Supreme Court would resolve the dispute when it granted certiorari in *Siegert v. Gilley*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1789, 114 L.Ed.2d 277 (1991), but the Court did not reach the question. See *id.* 111 S.Ct. at 1795 (Kennedy, J., concurring) (indicating that he would have preferred that the Court resolve the issue).

<sup>4</sup>See *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir,1991) ("In this circuit one panel may not overrule the decision, right or wrong, of a prior panel, in the absence of en banc consideration or superseding decision of the Supreme Court.") (citations and quotations omitted).

**Charlene LEATHERMAN, Kenneth Leatherman, as Individuals and Next Friends of Travis Leatherman; Gerald Andert, Kevin Lealos, Jerri Lealos, as Individuals and Next Friends of Shane Lealos; Travor Lealos, Pat Lealos, Donald Andert, Lucy Andert, Plaintiffs,**

**v.**

**TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, Tarrant County, Texas, Tim Curry, in His Official Capacity as Director of Tarrant County Narcotics and Coordination Unit, Don Carpenter, City of Lake Worth, Texas, City of Grapevine, Texas, Defendants.**

**Civ. A. No. 4-89-842-A**

United States District Court,  
N.D. Texas  
Fort Worth Division.

Jan. 22, 1991.

**MEMORANDUM OPINION  
AND ORDER**

**McBRYDE, District Judge.**



Came on to be considered (1) the motions of defendants The Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"); Tim Curry ("Curry"), in his official capacity as Director of TCNICU; Tarrant County, Texas ("Tarrant"); and Don Carpenter ("Carpenter"), in his official capacity as Sheriff of Tarrant, to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and for summary judgment pursuant to Fed.R.Civ.P. 56, and (2) the motion of defendant City of Grapevine, Texas ("Grapevine") to dismiss pursuant to Rule 12(b)(6). The court has determined that the dismissals sought by such motions should be granted and that the claims against the remaining defendant, City of Lake Worth, Texas, ("Lake Worth") should also be dismissed.

*Nature and History of the Litigation*

This sec. 1983<sup>1</sup> action was removed to this court from a state district court. When removed, it was an action by Charlene Leatherman and Kenneth Leatherman, as individuals and next friends of

---

<sup>1</sup> 42 U.S.C. sec. 1983.

Travis Leatherman, as plaintiffs (the "Leatherman plaintiffs"), against TCNICU and Tarrant, as defendants.

Shortly after the removal occurred, TCNICU and Tarrant filed a motion to dismiss pursuant to Rule 12(b)(6) and a motion for summary judgment pursuant to Rule 56. The court, acting through Judge David O. Belew, Jr., granted the requested dismissal by order signed February 1, 1990. Plaintiffs moved to vacate the dismissal, which the court, acting through Judge Belew, did by order signed March 8, 1990. The order vacating the dismissal directed the Leatherman plaintiffs to amend their complaint within twenty (20) days. Their amended complaint was filed March 23, 1990. Not only did it restate the claims of the Leatherman plaintiffs, but it added new plaintiffs, who asserted causes of action based on a set of facts that was separate and distinct from the set of facts upon which the Leatherman Plaintiffs were

basing their claims and a new group of defendants.<sup>2</sup> The added plaintiffs were Gerald Andert, Donald Andert, Lucy Andert, Pat Lealos and Kevin and Jerri Lealos, individually and in their capacities as next friends of Shane and Trevor Lealos, minors (the "Andert/Lealos plaintiffs"); and, the newly named defendants were Curry, in his official capacity, Carpenter, in his official capacity, Grapevine and Lake Worth.

The motions that are now before the court were filed in response to the allegations of the amended complaint. Lake Worth has answered, but has not moved for dismissal.

The claims of the Leatherman plaintiffs are predicated on things that happened at the time of a putative drug raid on the Leatherman home. Allegations of the amended complaint assert as to the Leathermans that: (1) in May 1989 the Leatherman home was entered and searched by law

---

<sup>2</sup> There is a question as to the authority of plaintiffs to add the new parties and causes of action, but, in view of the grant of dismissals, the court does not need to resolve that matter.

enforcement officers employed by and under the control of TCNICU, Tarrant and Lake Worth; (2) during the course of the search two dogs belonging to the Leathermans were shot to death; (3) the officers threatened to shoot two of the Leathermans; (4) after the officers realized that none of the items described in the warrant pursuant to which they entered the Leatherman home were present, the officers frolicked in the driveway and yard of the residence; and (5) the conduct of the law enforcement officers deprived the Leathermans of rights they have under the fourth and fourteenth amendments of the United States Constitution.

An earlier, unrelated, putative drug raid gave rise to the claims of the Andert/Lealos plaintiffs. The allegations in reference to those plaintiffs are that: (1) in January 1989 law enforcement officers of Grapevine and TCNICU broke into the Lealos home under authority of a search warrant; (2) one of the officers clubbed Gerald Andert in the head; (3) the officers held the Andert and Lealos family members at gunpoint, causing them to fear for their

lives, and forced them to lie face down on the floor, and, in the course of doing so, the officers shouted obscenities and threats at family members who made requests for identification of the intruders; (4) after having discovered from a search of the Lealos residence no items that could form the basis of criminal prosecution, the officers left the premises without an apology; and (5) the conduct of the law enforcement officers deprived the Andert/Lealos plaintiffs of their fourth and fourteenth amendment rights.

None of the law enforcement officers who participated in the activities described in the amended complaint are named as defendants. The sole defendants are TCNICU, Tarrant, Curry, in his official capacity, Carpenter, in his official capacity, Grapevine, and Lake Worth.

#### **Allegations Directed Against Curry and Carpenter:**

No allegations against Curry or Carpenter in a non-official capacity.

The allegations against Curry are that, at pertinent times, he, as director of TCNICU, was

vested with official authority and responsibility for establishing policies for and supervising the day-to-day operations and practices of law enforcement personnel participating in and compromising [sic] TCNICU; that TCNICU acted by and through "its official policymaker", Curry, in respect to policies and practices of TCNICU having to do with training of its officers; and, that a custom and policy of TCNICU of which plaintiffs complain was so persistent and widespread that Curry, as the official policymaker of TCNICU, either knew or should have known of its existence.

The allegations against Carpenter are virtually identical to those against Curry except that the complaint against Carpenter is in his capacity as Sheriff of Tarrant, and the allegations against him are in reference to the conduct of Tarrant and are based on his alleged capacity as the "official policymaker" of Tarrant.

No recovery is sought by plaintiffs from Curry or Carpenter.

The Theories of Recovery Alleged Against the



## Public Entity Defendants:

After alleging acts of allegedly wrongful conduct on the part of the law enforcement officers who engaged in the raids of which plaintiffs complain, plaintiffs seek to impose responsibility on the public entities by boilerplate, conclusionary allegations pertaining, first, as to all public entity defendants, to adequacy of training of the law enforcement officers and, second, as to TCNICU, to an alleged custom and practice to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of odors associated with illegal drug manufacturing.

*The Threshold Reason why Dismissal  
Should be made as to Curry  
and Carpenter*

In *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct 873, 83 L.Ed.2d 878 (1985), the Supreme Court made clear that an action brought under sec. 1983 against a police officer in his official in his official capacity is tantamount to an action against the public entity for which the official is alleged to act. Individual liability of the official cannot flow from a suit

against him in his official capacity. A judgment against him in that capacity is the same as a judgment against the public entity he represents, assuming that the public entity has received notice and an opportunity to respond. *Brandon*, 469 U.S. at 471-72, 105 S.Ct. at 877-78.

Inasmuch as Curry and Carpenter are sued only in their respective official capacities, and the respective entities they are alleged to represent are joined as party defendants, there is no reason why Curry or Carpenter should continue to be defendants in this action. The court is ordering their dismissal. There appear to be other reasons why Curry and Carpenter should be dismissed from the suit, but the court does not need to go beyond this threshold reason.

*The Inspirations for Plaintiffs' "Inadequate  
Training" and "Custom and  
Practice" Allegations*

The inadequate training allegations are inspired by the holding of the Supreme Court in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct 1197, 103 L.Ed.2d 412 (1989). Plaintiffs allege, in a



conclusionary way, the elements of a sec. 1983 inadequate training cause of action, as defined in *City of Canton*, against each of the public entity defendants.

Plaintiffs' "custom and practice" allegations related to the obtaining of search warrants on the basis of nothing more than detection of odors associated with illegal drug manufacturing have their genesis in the Supreme Court's *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), opinion. Again, plaintiffs have used in a conclusionary way the words that speak the cause of action defined by the Supreme Court.

*Particularity Required in a Pleading  
that Purports to Assert a sec. 1983  
Action Against a Public Entity*

The Fifth Circuit repeatedly has held that district courts should hold plaintiffs in sec. 1983 actions such as this to a high degree of particularity in their pleadings. See *Rodriguez v. Avita*, 871 F.2d 522 (5th Cir.1989); *Palmer v. City of San Antonio, Texas*, 810 F.2d 514 (5th Cir.1987); *Elliott v. Perez*, 751 F.2d

1472 (5th Cir.1985); and *Morrison v. City of Baton Rouge*, 761 F.2d 242 (5th Cir.1985). *Elliott* explained the policy reason why "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints" will not suffice, and noted that a lack of pleading particularity "eviscerates important functions and protections of official immunity." 751 F.2d at 1476.

In *Elliott*, the Fifth Circuit stated that:

In the now familiar cases involving 42 U.S.C. sec. 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations.

*Id.* at 1479.

While *Elliott* dealt with an action against public officials, its principles apply with equal force to an action against a public entity. *Palmer* was such an action. Apropos to the instant case, the Fifth Circuit said in *Palmer*:

Similarly, an isolated incident is not sufficient to show that a custom exists. As we stated in *Bennett v. City of Slidell*, 728 F.2d 762, 768 n. 3 (5th Cir.1984)(en banc), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d

612 (1985): "Isolated violations are not the persistent often repeated, constant violations that constitute custom and policy."

....

We have also consistently required a section 1983 plaintiff to state specific facts and not merely conclusory allegations. *Elliott v. Perez*, 751 F.2d 1472, 1479 & n. 20 (5th Cir.1985) (citing cases). While it might be possible that a basis for municipal liability exists in this case, Palmer states no facts in his complaint to support his assertion that San Antonio authorized and approved the practice of its police officers using excessive force when making arrests or that such a well settled practice of doing so existed. Although Palmer has already amended his complaint once, the complaint still fails to meet the requirements of *Elliott*. As we have made clear, the assertion of a single incident is not sufficient to show that a policy or custom exists on the part of a municipality. *Slidell*, 728 F.2d at 768 n. 3. Palmer failed to allege that there are prior incidents which, if taken as true, would reveal the existence of an unconstitutional custom on the part of San Antonio. Accordingly, we affirm the district Court's order of dismissal

with respect to the city of San Antonio.

810 F.2d at 516-17.

*Rodriguez* made clear that boilerplate, conclusory allegations combined with a description of a single incident will not suffice. When speaking in reference to a pleading that was no more generally worded than the one involved in this action, the court had the following to say:

Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer--a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else. It is clear from counsel's quoted colloquy with the trial judge that he has pled his case fully and has nothing to add, that the sole foundation for his general and conclusory allegations of "gross negligence" and "grossly inadequate training" was the pleaded incident itself. Under the rules of *Tuttle and Languirand [v. Hayden]*, 717 F.2d 220 (5th Cir.1983) discussed above, there is no case---not as a matter of pleading, merely, but as one

of conceded fact.

871 F.2d at 555.

*Plaintiffs' Pleadings do Not Contain  
the Required Particularization*

Though plaintiffs were afforded an opportunity to amend in response to an earlier Rule 12(b)(6) motion to dismiss, and did file such an amendment, plaintiffs' allegations of their theories of municipal entity liability are blunderbuss in character and describe only isolated incidents "decked out with general claims of inadequate training ...." and the like. *Rodriguez*, 871 F.2d at 555.

The inadequate training allegations of the Leatherman plaintiffs is limited, as to each defendant, to (a) claims of failure to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants, and (b) the impermissibly broad allegations that there was a failure "to formulate and implement an adequate policy to train its

officers on the Constitutional limitations restricting the manner in which search warrants may be executed." There is no mention in the complaint of more than one incident of confrontation by officers of a defendant with family dogs. All inadequate training allegations of the Andert/Lealos plaintiffs are boilerplate claims of the "failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed" variety. The complaint does not suggest the kind of training that plaintiffs contend should have been, but was not, given; nor, is there any specificity or particularity as to other elements of the inadequate training theory.

Moreover, neither the descriptions contained in the complaint of the searches made of the two residences in question nor related allegations provide in the least the particularization that would be necessary to state factually a deliberate indifference to the Constitutional rights of persons likely to be affected by a failure to train or a failure



to formulate and implement an adequate policy to train.

The shortcomings of the allegations of the complaint on the "training" theories, standing alone, provide reason for dismissal of all plaintiffs' claims based on those theories.

The same can be said of the generally stated allegations asserting the theory that TCNICU should be held liable because of an alleged custom and practice of TCNICU and its law enforcement personnel to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of odors associated with illegal drug manufacturing. No facts are pleaded that would satisfy the multiplicity of incident requirement. Clearly, the pleading does not present a case of custom and practice under the standards of particularization adopted by the Fifth Circuit. The court turns now to another reason why the pleading must fail as to the "odor" theory.

*The Issuance of the Search Warrant Predicated on no More than the Detection of an Odor Associated with Illegal Drug Manufacturing or Trafficking is an Acceptable Practice*

In *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436 (1948), law enforcement officers entered and searched defendant's hotel room after they recognized coming from her room a strong odor of burning opium. Incriminating opium and smoking apparatus were found. The Supreme Court held that the search was improper, but in the course of doing so explained:

At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain defendant's contention, erroneously made, on the strength of *Taylor v. United States*, 286 U.S. 1 [52 S.Ct. 466, 76 L.Ed. 951 (1932)], that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant



qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

*Johnson*, 333 U.S. at 13, 68 S.Ct. at 369.

In *United States v. Ogden*, 572 F.2d 501, 502 (5th Cir.1978), the court said that:

The agent's identification of the odor of marijuana is enough to support probable cause to search. *See, e.g., United States v. Villarreal*, 5 Cir., 1978, 565 F.2d 932, 937. No warrant is required for the search of an automobile under such circumstances.

And, in *United States v. Rivera*, 595 F.2d 1095, 1099 (5th Cir.1979), the court noted that "[i]t is well settled that detection of the odor of marijuana furnishes probable cause to search a vehicle."

Thus, a complaint that TCNICU has a custom and practice to prepare affidavits and cause issuance and execution of search warrants predicated on no more than detection of odors

associated with illegal drug manufacturing does not state a cause of action. This provides a self-sufficient, independent reason for dismissal of the "odor" theory of recovery.

*Viewing the Matter from a Rule  
56 Perspective*

If the court were to overlook the pleading inadequacies, plaintiffs nevertheless would be unable to clear the hurdle created by the Rule 56 motion.

In *McKee v. City of Rockwall, Texas*, 877 F.2d 409 (5th Cir.1989), the Fifth Circuit considered an action against a public entity under section 1983 in a summary judgment context. The claim of McKee was based on an alleged policy of the Rockwall police department discouraging arrests in domestic violence cases, which McKee contended discriminated against women. In the course of discussing McKee's summary judgment burden on the issue of whether the police department had a discriminatory policy, the court explained:

McKee must present some evidence  
of such a policy in order to survive the

defendants' summary judgement motion. When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

*Id.* at 414-15 (quoting ... *Celotex Corp. v. Catrett*, 447 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

While applying *City of Canton*<sup>3</sup> to a claim of individual liability rather than a claim public entity liability, the Third Circuit in *Sample v. Diecks*, 885 F.2d 1099 (3rd Cir.1989), provided a helpful discussion of the degree of proof that must be brought to bear by a plaintiff in order to avoid a summary disposition. The court said:

Based on *City of Canton*, we conclude that a judgment could not properly be entered against Robinson in this case based on supervisory

<sup>3</sup> *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

liability absent an identification by Sample of a specific supervisory practice or procedure that Robinson failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstay, (2) Robinson was aware that this unreasonable risk existed, (3) Robinson was indifferent to that risk, and (4) Diecks' failure to assure that Sample's complaint received meaningful consideration resulted from Robinson's failure to employ that supervisory practice or procedure....

On remand, the district court should bear in mind that under the teachings of *City of Canton* it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did. The district court must insist that Sample identify specifically what it is that Robinson failed to do that evidences his deliberate indifference. Only in the context of a specific defalcation on the part of the supervisory official can the court assess whether the official's conduct evidenced deliberate indifference and

whether there is a close causal relationship between the "identified deficiency" and the "ultimate injury."

885 F.2d at 1118.

In *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985), the Supreme Court emphasized the burden of proof in a case where liability is sought to be imposed under *Monell*<sup>4</sup>, saying:

Here the instructions allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the municipal corporation from the single incident described earlier in this opinion, and at the same time sanctioned the inference that the "policy" was the cause of the incident. Such an approach provides a means for circumventing *Monell*'s limitations altogether. Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal

<sup>4</sup> *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Under the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly reversed.

And, the heavy burden of proof to be borne by plaintiff in a case such as this was again recognized in *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986):

We hold that municipal liability under section 1983 attaches where---and only where---a deliberate choice to follow a course of action is made from among various alternatives by the official or



officials responsible for establishing final policy with respect to the subject matter in question. See *Tuttle*, supra [471 U.S.] at 823, 85 L.Ed.2d 791, 105 S.Ct. 2427 [at 2436] ("policy" generally implies a course of action consciously chosen from among various alternatives").

The only evidentiary items adduced by plaintiffs in response to the Rule 56 motion are the affidavits of plaintiffs Charlene Leatherman, Travis Leatherman, Gerald Andert, Donald Andert, Kevin Lealos and Jerri Lealos and the report of persons who apparently were hired by the attorneys for the plaintiffs to interview the Andert/Lealos plaintiffs. Those items deal with the facts of the specific incidents about which plaintiffs complain, and damages allegedly flowing to plaintiffs as a consequence of those incidents, but shed no light whatsoever on the factors that are so crucial to establishment of section 1983 liability against a public entity. Plaintiffs simply have not come forward with any evidence to satisfy the summary judgement burden that was cast on them once

defendants made their Rule 56 challenge. At most, plaintiffs might have raised issues of impropriety on the part of the individual officers who participated in the raids. Quite clearly, this does not create an issue of liability on the part of the public entity defendants. The Supreme Court emphasized in its *Monell v. New York City Department of Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), opinion that a public entity is not liable solely because it employs a tortfeasor:

On the other hand, the language of section 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor---or, in other words, a municipality cannot be held liable under section 1983 on a respondeat superior theory.

....  
We conclude, therefore, that a local government may not be sued under section 1983 for an injury inflicted



solely by its employees or agents.

*Id.* at 691, 694, 98 S.Ct. at 2036, 2037.

Thus, if the potential of dismissal is viewed from a summary judgement standpoint, the same result obtains---plaintiffs' claims should be dismissed.

Even though Grapevine and Lake Worth are not summary judgment movants, the record of this case makes appropriate *sua sponte* summary rulings by the court in favor of those defendants. The same reasons why summary rulings should be made for TCNICU and Tarrant exist as to the claims by plaintiffs against Grapevine and Lake Worth. Plaintiffs have had ample opportunity to come forward with evidence in support of their claims of public entity liability against all defendants, and have had sufficient notice that they must bring their evidence forward or suffer dismissals. *See Catrett v. Johns--Manville Sales Corp.*, 756 F.2d 181, 189 (Bork, J., dissenting) (D.C.Cir.1985), *rev'd sub nom. Celotex Corp v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) (citing Bork dissent with approval).

### *Other Grounds of the Defense Motions*

The motions of TCNICU, Curry, in his official capacity, Tarrant, and Carpenter, in his official capacity, state grounds for dismissal that are not discussed in this memorandum opinion. The court has not been required to consider any of those other grounds in order to reach the conclusion that all of plaintiffs' claims should be dismissed.

### *Request of Plaintiffs Pursuant to Rule 56(f)*

At pages 24-25 of their reply in opposition to the second motions of TCNICU, et al, to dismiss and for summary judgment, plaintiffs say that the motion for summary judgment should be denied pursuant to Fed.R.Civ.P. 56(f) "for the reason that Plaintiffs, as non-moving parties, have not had a reasonable opportunity to discover information that is essential to their opposition to the Defendants' Motion." The argument made by plaintiffs on this subject, and the supporting affidavit of attorney Gladden, rely on the circumstance that no documents have been produced pursuant to a document production request that was served by

plaintiffs on TCNICU and Tarrant in May 1990.

The court is not persuaded by plaintiffs' arguments. This suit was filed in December 1989, and plaintiffs have had ample opportunity to engage in full discovery since then. The document production request to which plaintiffs refer is limited to documents that indicate the results of execution of search warrants, since the formation of TCNICU, that were initiated because of the detection of odors associated with the operation of an illegal drug manufacturing laboratory. Obviously, any inability of plaintiffs to acquire documents bearing on that limited subject provides no excuse for failure of plaintiffs to develop evidence in response to the motion for summary judgment, if any was available to be had. Plaintiffs have known since December 1989, when TCNICU and Tarrant filed their first motion for summary judgment, that there was a need to develop and put in the record whatever summary judgment evidence could be developed in support of plaintiffs' claims.

If plaintiffs' allegations are factually based,

plaintiffs' counsel are presumed to have had knowledge of the factual basis when they signed the original and amended complaints. *See* Fed.R.Civ.P. 11. In *Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir.1989), the court took into account the requirements of Rule 11 in giving an explanation of the strict pleading requirements in a case of this kind:

Long before the filing of the pleading quoted above, it had been laid down as the law of our Circuit that in "cases invoking 42 U.S.C. section 1093 we consistently require the claimant to state specific facts, not merely conclusory allegations." *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir.1985), and see authorities from this and other circuits cited at note 20. Cases such as *Elliott*, where the immunity to suit of governmental officials is at stake, present a special and acute subset of the general run. In view of the enormous expense involved today in litigation, however, of the heavy cost of responding to even a baseless legal action, and of Rule 11's new language requiring reasonable inquiry into the facts of the case by an attorney *before* he brings an

action, applying the stated rule to all section 1983 actions has much to recommend it. There can be scant imposition, after all, in requiring a pleader who has already inquired into the facts of his case to replead his understanding of them, as our authorities cited have often suggested....

### *Order*

For the reasons given above, the court is ordering that all claims of all plaintiffs against any defendant are dismissed. A separate judgment of dismissal, finally disposing of this action, is being signed contemporaneously with the signing of this memorandum opinion and order.

## STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Rule 8 of the Federal Rules of Civil Procedure provides in parts pertinent to this petition:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief

in the alternative or of several different types may be demanded.

\* \* \*

(e) Pleading to be concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

Title 28, United States Code, Section 2072 provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for purposes of appeal under section 1291 of this title.



MAY 13 1992

OFFICE OF THE CLERK

No. 91-1657

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1991

CHARLENE LEATHERMAN, ET AL.,  
*Petitioners*

vs.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, ET AL.,  
*Respondents*

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

**BRIEF IN OPPOSITION**

TIM CURRY  
Criminal District Attorney  
Tarrant County, Texas

VAN THOMPSON, JR.  
Assistant District Attorney  
State Bar No. 19960000  
401 West Belknap  
Fort Worth, Texas 76196-0401  
(817) 884-1233

*Attorney for Respondents*

Tarrant County Narcotics  
Intelligence and Coordination  
Unit, Tarrant County, Texas,  
Don Carpenter and Tim Curry

**QUESTION PRESENTED**

Whether the dismissal under Rule 12(b)(6), FED. R. CIV. P., of a civil rights action brought pursuant to 42 U.S.C. §1983 for failure to comply with "heightened pleadings" requirements is contrary to the "notice" pleading of Rule 8, FED. R. CIV. P., and prohibited by the Rules Enabling Act, 28 U.S.C. §2072(b)?

## LIST OF PARTIES

### PETITIONERS:

Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman; Gerald Andert, Kevin Lealos and Jerry Lealos, individually and as next friend for Travor Lealos and Shane Lealos, Pat Lealos, and Donald Andert.

### RESPONDENTS:

Tarrant County Narcotics Intelligence and Coordination Unit; Tarrant County, Texas, Tim Curry, in his official capacity, and Don Carpenter, in his official capacity; City of Lake Worth, Texas; and City of Grapevine, Texas.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
JURISDICTION .....	2
STATEMENT OF THE CASE .....	2
REASONS FOR DENYING THE WRIT .....	5
A. NOTICE PLEADING NOT SATISFIED .....	5
B. THERE WERE ALTERNATE GROUNDS FOR AFFIRMANCE.....	6
CONCLUSION.....	8

## TABLE OF AUTHORITIES

<i>Cases</i>	Page
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	6, 7
<i>City of Canton, Ohio v. Harris</i> , — U.S. —, 109 S.Ct. 1197 (1989) .....	5, 6, 8
<i>Monell v. New York City Dept. of Social Services</i> , 436 U.S. 658 (1978) .....	5
<i>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit</i> , 755 F.Supp. 726 (N.D. Tex. 1991), <i>aff'd</i> , 954 F.2d 1054 (5th Cir. 1992) .....	1, 2, 6, 7
<i>Codes</i>	
42 U.S.C. §1983 .....	2, 5, 6
<i>Rules</i>	
Rule 11, FED. R. CIV. P. ....	7
Rule 12(b)(6), FED. R. CIV. P. ....	2, 3
Rule 56, FED. R. CIV. P. ....	2, 3
Rule 56(e), FED. R. CIV. P. ....	6
<i>Constitutional Provisions</i>	
United States Constitution	
4th Amendment .....	2, 3
5th Amendment .....	2
14th Amendment .....	2, 3

No. 91-1657

IN THE

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHARLENE LEATHERMAN, ET AL.,

*Petitioners*

vs.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, ET AL.,*Respondents*On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

## BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE  
UNITED STATES:

Respondents Tarrant County Intelligence and Coordination Unit, Tarrant County, Texas, Don Carpenter, in his official capacity as Sheriff of Tarrant County, Texas, and Tim Curry, in his official capacity as Criminal District Attorney of Tarrant County, Texas, respectfully request that the Court deny the Petition for writ of certiorari, which seeks to review the opinion and judgment of the United States Court of Appeals in *Leatherman et al., v. Tarrant County Narcotics Intelligence and Coordination Unit, et al.*, reported in 954 F.2d 1054 (5th Cir. 1991), affirming the Judgment and Memorandum Opinion of the District Court, reported at 755 F.Supp. 726 (N.D. Tex. 1991).



## JURISDICTION

These respondents do not challenge the statutory provision on which Petitioners rely for jurisdiction, nor is the timeliness of the petition questioned.

## STATEMENT OF THE CASE

The original Plaintiffs, Charlene Leatherman, Kenneth Leatherman, individually and as next friends for Travis Leatherman, brought suit under 42 U.S.C. §1983 in the 96th Judicial District Court of Tarrant County, Texas, against the Tarrant County Narcotics Coordination and Intelligence Unit and Tarrant County, Texas, alleging violation of their constitutional rights guaranteed under the 4th, 5th, and 14th Amendments of the Constitution, under various sections of the Texas Constitution, and under the common law of Texas, because of an asserted illegal arrest and detention of Plaintiffs and destruction of Plaintiffs' dogs by unnamed officers during the execution of a search warrant on property and a residence occupied by Plaintiffs.

Defendants removed this cause to the United States District Court, and moved for dismissal or for summary judgment, pursuant to Rules 12(b)(6) and 56, FED. R. CIV. P. This motion was not responded to and was granted by the District Court.

Plaintiffs moved to vacate the Order of Dismissal and requested leave to amend their pleadings "to conform to the technical pleading requirements under 42 U.S.C. §1983." Although Defendants opposed this motion for the reason that no justification was presented by Plaintiffs for their failure to respond to Defendants motion or to adduce any controverting summary judgment evidence, the Order of Dismissal was vacated and Plaintiffs were allowed to amend.

By Amended Complaint, in addition to the original Plaintiffs, a whole new set of parties complaining of an additional entirely separate and different occurrence were added, and District Attorney Curry and Sheriff Carpenter were added as new additional Defendants in their official capacities only. In the Amended Complaint both sets of Plaintiffs asserted violation of their constitutional rights guaranteed under the 4th and 14th Amendments of the Constitution to be free of unreasonable search and seizure. By entirely conclusory allegations Plaintiffs claimed that the alleged civil rights violations were the result of failure of the Defendants to properly train law enforcement officers under their control (a) as to the proper manner in which to respond when confronted by family dogs when executing search warrants, and (b) "to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed." Plaintiffs also claimed that the search and arrest warrants involved "were invalid when issued and do not state probable cause because they are based on the detection by the officers seeking the warrants of odors associated with chemicals utilized in the manufacture of illicit drugs by clandestine drug laboratories." Plaintiffs asserted this was "insufficient as a matter of law to establish probable cause." Plaintiffs alleged because of the "custom, policy or practice" of Defendants TCNICU and Tarrant County to prepare and seek such warrants liability could be imposed upon these entities.

By Motion to Dismiss or for Summary Judgment Defendants sought dismissal of the Amended Complaint pursuant to Rule 12(b)(6), FED. R. CIV. P., for failure to state any claim upon which relief may be granted, or, in the alternative for summary judgment under Rule 56, FED. R. CIV. P.

Plaintiffs then filed a massive request for production of documents requesting every file of the TCNICU since its

inception in 1988 wherein a search warrant had been sought based primarily on the detection of the distinctive odors associated with the clandestine manufacture of amphetamines. This would have required the examination of several thousand files. No discovery was ever attempted concerning the training or supervision of the officers executing search warrants on behalf of Tarrant County or specifically the TCNICU. This is the only discovery request made by Plaintiffs in this action, although belatedly some depositions were taken from the individual law enforcement officers involved.

Defendants filed their Motion for Protective Order as to Plaintiffs' Request for Production of Documents which was granted.

Plaintiffs filed their Reply and Brief in Opposition to Defendants' Joint Motion to Dismiss or for Summary Judgment, and a Supplemental Response to Defendants' Joint Motion to Dismiss or for Summary Judgment.

The District Court granted Defendants' Motion to Dismiss or for Summary Judgment and ordered Plaintiffs' complaint dismissed and that Plaintiffs recover nothing from any of the Defendants. On the same date the District Court filed its Memorandum Opinion and Order setting forth its reasons for the dismissal of Plaintiffs' complaint.

The Court of Appeals affirmed the Judgment of the District Court. Although the 5th Circuit opinion was predicated on Plaintiffs' failure to allege any specific facts in support of its claims of failure to train and unconstitutional policy, this result could equally have been supported on the ground that Plaintiffs entirely failed to support their claims by any summary judgment evidence.

## REASONS FOR DENYING THE WRIT

### A. Notice Pleading Not Satisfied

The Amended complaint in the instant cause wholly failed to identify any specific deficiency in training by any law enforcement agency or its governing body or to identify any close causal nexus between the alleged deficiency and the asserted injuries of either group of Plaintiffs. Plaintiffs' "failure to train" allegations would not satisfy even "notice pleading" requirements. The complaint is insufficient under the recognized standards of this Court.

In the seminal failure to train case, *City of Canton, Ohio v. Harris*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1197, 1205 (1989), the Court stated the elements of a "failure to train" claim under which a local governmental entity can be held liable under §1983:

"Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under §1983 . . .

Monell's<sup>1</sup> rule that a city is not liable under §1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible.

The Court went on to identify the elements required for liability to attach for failure to properly train plaintiff must show (1) the specific deficiency in training, (2) that such deficiency represents "policy," and (3) a close relationship to the injury claimed. *Id.* at 1205-06. A plaintiff attempting to assert a

<sup>1</sup>*Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

§1983 action based on "failure to train," is required to state these necessary elements, which Plaintiffs here did not even attempt. Clearly, the Court by analogy rejected an approach like that of Plaintiffs here of merely invoking the magic conclusionary language of "failure to train." It is abundantly clear in *City of Canton* that a bald assertion that a local governmental entity has an unconstitutional policy is insufficient. Essentially that is all Plaintiffs did in this case.

### B. There Were Alternate Grounds For Affirmance

Although the District Court also granted summary judgment to Defendants herein,<sup>2</sup> the Court of Appeals herein did not reach the question of the correctness of this ruling.<sup>3</sup> However, the Judgment of the District Court is fully supportable on this basis because Plaintiffs did not adduce a shred of summary judgment to support any of the elements required to support their conclusory "failure to train" and "policy" allegations.

Rule 56(e), FED. R. CIV. P., requires that the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." The party moving for summary judgment need not produce evidence showing the absence of a genuine issue of material fact with respect to an issue as to which the nonmoving party bears the burden of proof, "since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rather, the

<sup>2</sup>755 F.Supp. at 731: "If the court were to overlook the pleading inadequacies, Plaintiffs nevertheless would be unable to clear the hurdle created by the Rule 56 motion."

<sup>3</sup>954 F.2d at 1058 n. 6: "The district court ruled, in the alternative, that summary judgment was appropriate and that no further discovery was necessary. Because we hold that the district court properly dismissed the complaints based on the insufficiency of the allegations, we need not reach the other issues raised."

party moving for summary judgment need only show that the party who bears the burden of proof has adduced no evidence to support an essential element of his case. *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 325.

As pointed out by the District Court in this cause,<sup>4</sup> Plaintiffs herein have known at least since the first dismissal of this case that factual evidence to support their conclusory allegations of "policy" would be required and that under the requirements of Rule 11, FED. R. CIV. P., they were required to make adequate prefiling inquiry and are "presumed to have knowledge of the factual basis of their suit when they signed the original and amended complaints." Yet to date Plaintiffs have not either pleaded any such facts or attempted to adduce any summary proof to support their conclusory allegations.

<sup>4</sup>755 F.Supp. at 734.



## CONCLUSION

For the reasons heretofore stated and discussed Respondents respectfully submit that although Petitioners claim an issue of significant constitutional magnitude is presented by this case, the instant cause is not worthy of the grant of a writ of certiorari because Petitioners did not satisfy even notice pleading requirements stated in *City of Canton, Ohio v. Harris, supra*, and Petitioners are foreclosed by alternate grounds of decision not reached by the Court of Appeals.

Respectfully submitted,

TIM CURRY  
Criminal District Attorney  
Tarrant County, Texas

VAN THOMPSON, JR.  
Assistant District Attorney  
State Bar No. 19960000  
401 West Belknap  
Fort Worth, Texas 76196-0401  
(817) 884-1233

## COUNSEL OF RECORD

*Attorney for Respondents*

Tarrant County Narcotics  
Intelligence and Coordination  
Unit, Tarrant County, Texas,  
Don Carpenter and Tim Curry

6

No. 91-1657

Supreme Court, U.S.  
FILED

MAY 14 1992

OFFICE OF THE CLERK

IN THE  
**Supreme Court of The United States**  
OCTOBER TERM, 1992

CHARLENE LEATHERMAN, et al,  
*Petitioners*

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al,  
*Respondents*

*On Petition for Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit*

**CITY OF GRAPEVINE, TEXAS' REPRINTED BRIEF  
IN OPPOSITION**

REPRINTED COPY

KEVIN J. KEITH\*  
DAVID L. BENFORD  
FOWLER, WILES, NORTON  
& KEITH, L.L.P.  
1900 CityPlace Center  
2711 North Haskell  
Dallas, Texas 75204  
214/841-3000

\*ATTORNEY OF RECORD

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS .....	i
INDEX OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	6
REASONS FOR NOT GRANTING THE PETITION	7
THE GRAVAMEN OF A 42 U.S.C. §1983 MUNICIPAL LIABILITY ACTION .....	8
PLAINTIFFS' ALLEGATIONS LACK A STATED FACTUAL BASIS .....	11
SEVERAL CIRCUIT COURTS REQUIRE FACT PLEADING OF §1983 CLAIMANTS .....	18
CONCLUSION .....	24

## INDEX OF AUTHORITIES

Cases	Page
<i>Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck</i> , 463 F.2d 620 (2nd Cir. 1972), <i>cert. denied</i> , 410 U.S. 944 (1973) . . . .	20
<i>Arnold v. Board of Education</i> , 880 F.2d 305 (11th Cir. 1989) . . . . .	22,23
<i>Canton v. Harris</i> , 489 U.S. 378 (1989) . . . . .	6,10,11
<i>Correa-Martinez v. Arrillaga-Belendez</i> , 903 F.2d 49 (1st Cir. 1990) . . . . .	19
<i>District Counsel 47, American Federation v. Bradley</i> , 795 F.2d 310 (3rd Cir. 1986) . . . . .	21
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) . . . .	7,12-14,16
<i>Elliott v. Thomas</i> , 937 F.2d 338 (7th Cir. 1991), <i>cert. denied sub nom. Propst v. Weir</i> , 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) . . . . .	17
<i>Estate of Himelstein v. Ft. Wayne</i> , 898 F.2d 573 (7th Cir. 1990) . . . . .	18
<i>Grandstaff v. Borger</i> , 767 F.2d 161 (5th Cir. 1985), <i>cert. denied</i> , 480 U.S. 916 (1987) . . . . .	12
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) . . . . .	18
<i>Johnson v. Wells</i> , 566 F.2d 1016 (5th Cir. 1978) . . . . .	23
<i>Kauffman v. Moss</i> , 420 F.2d 1270 (3rd Cir. 1970), <i>cert. denied</i> , 400 U.S. 846 (1970) . . . . .	21
<i>Languirand v. Hayden</i> , 717 F.2d 220 (5th Cir. 1983), <i>cert. denied</i> , 467 U.S. 1215 (1984) . . . .	6,11
<i>Lynch v. Cannatella</i> , 810 F.2d 1363 (5th Cir. 1987) . . . . .	15
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) . . . . .	15
<i>Monell v. Department of Social Services</i> , 436 U.S. 658, (1978) . . . . .	8,9
<i>Morrison v. Baton Rouge</i> , 761 F.2d 242 (5th Cir. 1985) . . . . .	12,15
<i>Nieto v. San Perlita Independent School District</i> , 894 F.2d 174 (5th Cir. 1990) . . . . .	15
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985) . . . . .	7,9,11

Cases	Page
<i>Palmer v. San Antonio</i> , 810 F.2d 514 (5th Cir. 1987) . . .	12,14
<i>Pembaur v. Cincinnati</i> , 475 U.S. 469 (1986) . . . . .	9,10
<i>Rodriguez v. Avita</i> , 871 F.2d 552 (5th Cir. 1989), <i>cert. denied</i> , 493 U.S. 854 (1989) . . . . .	6,12,14,15
<i>Rotolo v. Charleroi</i> , 532 F.2d 920 (3rd Circuit 1976) . . . . .	21
<i>Siegart v. Gilley</i> , 111 S.Ct. 1789 (1991) . . . . .	16-18
<i>Slotnick v. Staviskey</i> , 560 F.2d 31 (1st Cir. 1977), <i>cert. denied</i> , 434 U.S. 1077 (1978) . . . . .	20
<i>Stokes v. Bullins</i> , 844 F.2d 269 (5th Cir. 1988) . . . . .	12
<i>Streetman v. Jordan</i> , 918 F.2d 555 (5th Cir. 1990) . . . . .	13
<b>Statutes</b>	
Federal Rule of Civil Procedure 12(b)(6) . . . . .	7,19
42 U.S.C. § 1983 . . . . .	8



No. 91-1657

IN THE  
**Supreme Court of The United States**  
OCTOBER TERM, 1992

CHARLENE LEATHERMAN, et al,  
*Petitioners*

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al,  
*Respondents*

*On Petition for Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit*

---

**CITY OF GRAPEVINE, TEXAS' REPRINTED BRIEF  
IN OPPOSITION**

---

**STATEMENT OF THE CASE**

Respondent provides the following information omitted from Petitioners' Statement of the Case because it is relevant to the questions presented for review.

This civil rights claim was originally filed on November 22, 1989, by Charlene and Kenneth Leatherman, individually and in their capacities as next friends of their minor son Travis Leatherman (the Leatherman Plaintiffs), against Defendants Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU), and Tarrant County, Texas. The Leatherman Plaintiffs claimed that the Defendants were liable to them, under 42 U.S.C. § 1983 and state law, for damages arising out of the alleged illegal entry and search of their residence. The Leatherman Plaintiffs filed this suit in the 96th Judicial District

Court of Tarrant County, Texas. The City of Grapevine, Texas is not a party Defendant to the Leatherman allegations.

On December 12, 1989, Defendants TCNICU and Tarrant county petitioned the United States District Court for the Northern District of Texas, Fort Worth Division, for removal of the Leatherman Plaintiffs' claims to federal court under 28 U.S.C. § 1331. (R. 1) On December 20, 1989, the Defendants filed their Answer (R. 13), and simultaneously filed a Motion to Dismiss or for Summary Judgment. (R. 18) On February 1, 1990, Judge David O. Belew, Jr. entered an order to dismiss the Leatherman Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) because their complaint failed to state a claim upon which relief could be granted; specifically, Plaintiffs' complaint failed to allege any custom, practice or usage from which a policy may be inferred, which would violate any constitutional rights of the Plaintiffs in this cause. (R. 70).

On February 8, 1990, the Leatherman Plaintiffs filed a Motion to Vacate Dismissal of Plaintiffs' Complaints. (R. 71) On March 8, 1990, the district court granted Plaintiffs' motion to vacate dismissal and granted the Plaintiffs leave to amend their complaint with the expectation that they would conform their pleadings to specifically state facts to support a failure to train based § 1983 claim.

On March 23, 1990, the Plaintiffs filed their First Amended Complaint. In this complaint the Leatherman Plaintiffs added the City of Lake Worth, Texas as an additional Defendant. The amended complaint also included as additional Plaintiffs Gerald Andert, Donald Andert, Lucy Andert, Pat Lealos, and Kevin and Jerri Lealos, individually and in their capacities as next friends of their minor children, Shane and Trevor Lealos (The Lealos/Andert Plaintiffs). These new Plaintiffs asserted a separate cause of action and added the City of Grapevine, Texas as an additional Defendant. (Tr. 92) The amended complaint did not

specifically allege facts to support a failure to train based civil rights action.

On April 16 and April 17, 1990, both the City of Lake Worth (R. 125), and the City of Grapevine (R. 137), filed Original Answers. Concurrent with this activity the original Defendants, TCNICU and Tarrant County, filed their second Motion to Dismiss or for Summary Judgment. (R. 141) On June 7, 1990, these same two Defendants filed a Motion for a Protective Order. (R. 249) However, before these motions were decided by the court, a special order dated August 9, 1990 transferred the case from Judge Belew's court to Judge John H. McBride's. (R. 429)

On December 31, 1990, Judge McBride granted TCNICU and Tarrant County's protective order (R. 455), and on January 22, 1991, dismissed the Plaintiffs' complaint for a second time as to these two Defendants. In addition, the court dismissed the Plaintiffs' complaint against both Lake Worth and Grapevine. (R. 457)

The following is a brief description of the events which gave rise to the Andert/Lealos allegations against the City of Grapevine, Texas which allegations are the basis of this appeal. A similar description of the Leatherman allegations against the other Defendants is not provided here because the Leatherman Plaintiffs have made no claim against the City of Grapevine, Texas.

#### *The Andert/Lealos Claims*

On January 30, 1989, Sergeant R.W. Hart and Officer Tim Stewart of the Southlake Police Department answered an audible alarm call in the 2500 block of North Kimball in Southlake, Texas. Upon exiting his vehicle, Sgt. Hart smelled a very strong odor of phenacetic acid and ether. As a trained narcotics investigator, Sgt. Hart recognized these odors to be associated with the "cooking" of amphetamines. Officer Stewart also smelled the suspicious odor. (R. 179)

After contacting another officer from the Southlake Police Department and conducting a preliminary investigation, the officers contacted Sergeant Larry Traweck of the Tarrant County Narcotic Task Force to request assistance. Upon arrival, the Task Force members determined that there was an amphetamine lab in the immediate area. (R. 179) While searching for the source of the smell, the Task Force members pinpointed their investigation on a residence located at 2058 N. Kimball, belonging to Kevin and Jerry Lealos. Due to the fact that the wind was blowing from the South Southwest, the odor was very strong at the Northeast corner of the property, and could not be smelled on the south side of the property. (R. 183) However, Task Force members were unable to check the residence more closely because of several male subjects and a large dog in the yard. (R. 179)

Subsequently, Sgt. Traweck advised the Southlake Police Department that there was probable cause to begin gathering information in order to procure a search warrant. Besides the odor, the officers discovered several other reasons that made the issuance of the search warrant appropriate. A check of Water Department records indicated that water consumption at 2058 N. Kimball had risen from 13,000 gallons in December, 1988 to 17,000 gallons in January, 1989. Also, after acquiring the names of persons receiving mail at the residence from the post office, criminal history checks were run. The checks revealed that one of the subjects, Kevin Lealos, had an extensive criminal record. (R. 180)

When informed that the search warrant was written and signed Sgt. Hart when to the city manager and got permission to use the Grapevine Police Department Tactical Team for entry into the residence. In addition, Sgt. Hart told the city manager that he requested to have an ambulance and fire engine standing by. (R. 180)

The Grapevine Police Department Tactical Team, wearing black coveralls with the words "Grapevine Police" written in red

on their front pockets, entered the residence at approximately 8:00 p.m. As the Tactical Team entered the residence, they shouted "Police, get down!" numerous times. (R. 199) In fact, these shouts were heard by at least three officers who did not participate in the initial entry and were one block away from the residence at the time. (R. 181)

Once inside the residence, the Tactical Team members told the occupants to get down on the floor. One occupant of the residence, an older white male later identified as Gerald Andert, refused to get down on the floor and instead approached a member of the Tactical Team and became verbally abusive. Immediately thereafter, Gerald Andert lunged toward Police Officer Bewley and took hold of the barrel of his service revolver. (R. 197) Fearing that he was about to be disarmed, Officer Bewley struck Gerald Andert in the forehead with his flashlight. (R. 198) The Grapevine Tactical Team finished securing the house, requested medical assistance for Gerald Andert, and left when Southlake and Tarrant County Narcotic Task Force officers took charge of the scene. (R. 198)

Once inside the residence a search by Task Force officers revealed that there was not a drug lab on the premises at that time. (R. 185) At this point, the Southlake officers informed the occupants of the residence why they had executed a search of the home. Kevin Lealos, an occupant of the residence at the time of the search stated to officers that he thought the search was because of a van that was located on the premises. He stated that he had "loaned his van to someone and they had used it to boil some stuff in Euless." (R. 202) When officer Larry Traweck asked what was boiled in the van, Lealos refused to say anything more. (R. 202)

When brought to the ambulance by paramedics, Gerald Andert refused treatment for what the paramedics listed in their report as a "small contusion" on his forehead. (R. 200) The entire time that Gerald Andert was in police custody he was verbally abusive



to both the officers and the paramedics saying things such as, "Are one of you the assholes that hit me? You get that little punk back here with the blood on his stick that hit me and I'll kill him myself." (R. 202)

The search ended and the officers left the premises at approximately 9:15 p.m. All inclusive, the entire process took less than one and one-half hours. (R. 186)

### SUMMARY OF ARGUMENT

The Fifth Circuit correctly affirmed the district court's finding that the Plaintiffs' conclusory allegations of municipal liability for failure to train under 42 U.S.C. § 1983 failed to state a claim on which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To properly allege a § 1983 action it was necessary for the Plaintiffs to set forth a highly particularized pleading containing facts to support their claim. *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir. 1989). Plaintiffs did not do this and merely set forth boilerplate claims with one example of an alleged failure to train. Under both the Supreme Court decision of *Canton v. Harris*, 489 U.S. 378 (1989), and the Fifth Circuit opinion of *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), the one example made the basis of the present case is not enough to impose liability for failure to train, since the cited behaviour must "constitute gross negligence amounting to conscious indifference."

Once the district court concluded that the Plaintiffs failed to state a cause of action, the court correctly dismissed the Plaintiffs' claims sua sponte since it is widely acknowledged that it is within the discretion of the trial court to dismiss a complaint for failure to state a claim. Plaintiffs' conclusory boilerplate allegations had previously been dismissed for failure to state a claim and subsequently reinstated. The heightened pleading requirement preserves important functions and protections of official immunity while avoiding waste of taxpayer monies and judicial resources.

*Elliott v. Perez*, 751 F.2d 1472, 1477 (5th Cir. 1985). To establish a case of inadequate training the claimant must plead and prove facts "that the policy makers deliberately chose a training program which would prove inadequate". *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

In addition, the police officers who allegedly committed the civil rights violation. Greg Bewley and Larry Traweek, were recently granted take nothing judgments against the Andert/Lealos Plaintiffs with respect to the same facts made the basis of this suit. (See Appendix) Consequently, vindication of the individual officers' conduct renders moot the allegations of municipal liability for failing to adequately train the officers.

### REASONS FOR NOT GRANTING THE PETITION

The Fifth Circuit correctly affirmed the district court's dismissal of the Andert/Lealos Plaintiffs' 42 U.S.C. § 1983 claims against Defendant City of Grapevine because the Plaintiffs failed to state a cause of action upon which relief could be granted. In an order dated January 22, 1990, the district court dismissed all of the Plaintiffs' claims against all of the Defendants. (R. 475) This order included dismissal of the claims against both Defendant Cities of Grapevine and Lake Worth even though no Motion for Dismissal or Summary Judgment was filed by these Defendants. The district court entered this sua sponte dismissal under Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs' pleadings failed to state a claim on which relief could be granted. Plaintiffs do not challenge the sua sponte nature of the district court's action on Petition for Writ of Certiorari.



—In their First Amended Complaint, the Plaintiffs brought their claims against the City of Grapevine pursuant to 42 U.S.C. § 1983. (R. 92) 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, a citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Specifically, the Plaintiffs have alleged that:

. . . Defendant City of Grapevine failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Grapevine, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train . . .

Plaintiffs' First Amended Complaint (R. 104-105, 107) In order to understand why the district court dismissed these claims, it is helpful to review what is required to allege a § 1983 complaint against a municipality.

#### THE GRAVAMEN OF A 42 U.S.C. § 1983 MUNICIPAL LIABILITY ACTION

The landmark case in municipal liability under § 1983 is *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In *Monell* the Plaintiffs challenged the Defendant's policy of requir-

ing pregnant employees to take unpaid sick leave before it was medically necessary. The *Monell* holding establishes that § 1983 liability only applies to a municipality when the injury is visited pursuant to municipal "policy" or "custom." Since official policy is required, a municipality cannot be sued under § 1983 for injury inflicted solely by its employee or agent. In other words, the theory of respondeat superior is not enough to impose municipal liability. *Monell*, 436 U.S. at 677.

In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme Court further defined what is necessary in order to impose municipal liability. In *Tuttle*, Oklahoma city was sued under § 1983 because a police officer allegedly violated Tuttle's rights by using "excessive force in his apprehension." The Plaintiff charged that a municipal "custom or policy" had led to the Constitutional violations. *Tuttle*, 471 U.S. at 811. In reversing the decision by the lower courts, the Supreme Court stated that "Where the policy relied upon is not itself unconstitutional, considerably more proof than the sign incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 817.

Less than one year after *Tuttle*, the Supreme court decided *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur*, the court readdressed itself to the question of whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy the requirement under *Monell* and § 1983 that the action be taken pursuant to official municipal policy. On this occasion, the court decided that, subject to restrictions, a municipality could be held liable for a single incident of unconstitutional behavior. Justice Brennan, writing for a plurality states, "Where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur*, 475 U.S. at 478.

However, after making this broad statement, the Court immediately sought to limit it by emphasizing that § 1983 liability only attaches when the decision was made by someone who possesses final authority to establish municipal policy. *Id.* In addition, the court limited municipal liability by stating that, "Municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 479.

Finally, in *Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that failure to train municipal employees may serve as a basis for § 1983 liability only where it amounts to deliberate indifference to the rights of persons with whom the police come into contact. Furthermore, the deficiency in the city's training program must be closely related to the ultimate injury. The Supreme Court reasoned that the adoption of a lesser standard of fault would open municipalities up to enormous liability under § 1983 and would result in de facto respondeat superior. *Canton*, 489 U.S. at 387.

It is clear from applying the preceding Supreme Court cases to the facts of this case that the Plaintiffs did not plead a claim upon which relief could be granted. Plaintiffs urge that municipal liability for failure to train should be found for one incident of supposed failure to train. This is clearly not appropriate under the standards set by the Supreme Court for municipal liability under § 1983.

## PLAINTIFFS' ALLEGATIONS LACK A STATED FACTUAL BASIS

Even if all of the Plaintiffs' allegations are taken as true, they still fail to state a cause of action of municipal liability for failure to train its police officers. In their complaint, the Plaintiffs use mere "boilerplate" language (which tracks the exact language used in *Canton*), without any factual statements to back it up. First, the Andert/Lealos search was a completely legal search. The fact that it did not uncover the suspected drug lab does not make the basis for the search faulty from the outset, as Plaintiffs would have this Court believe. Thus, the unsuccessful raid had nothing to do with any training in executing search warrants that the municipality might have adopted, the police had a right to be in the Lealos home at the time the incident occurred.

In addition, the claim that Gerald Andert was struck without provocation cannot be determined to have been caused by the City of Grapevine's policy of alleged "inadequate training." As the Supreme Court stated in *Tuttle*, "... it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from a conscious choice — that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. at 817. Furthermore, Plaintiffs received a take nothing judgment in their trial against the individual officers accused of the wrongdoing in executing the warrant in question. (See Appendix)

In addition to the Supreme Court cases, the Fifth Circuit has a long standing tradition of being guarded concerning of § 1983 claims for municipal liability. Dealing with the issue of failure to train, the Fifth Circuit held in *Languirand* 717 F.2d at 227 that, "If there is a cause of action under § 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, such failure to train must



constitute gross negligence amounting to conscious indifference. . .” See e.g., *Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988); *Grandstaff v. Borger*, 767 F.2d 161 (5th Cir. 1985).

It is apparent from the pleadings in this case that, even if Plaintiffs’ pleadings are taken as true, no action taken by any police officer involved in the incident could constitute “gross negligence amounting to conscious indifference” on the part of the City of Grapevine. Therefore, under all of the standards illustrated above, Plaintiffs’ claims must fail.

Even if Plaintiffs had stated a substantive claim under § 1983, the form of their complaint still fails to meet the pleading requirements that the Fifth Circuit and other circuits have adopted in these cases. The Fifth Circuit has repeatedly held that the Plaintiff in such an action must set forth a highly particularized pleading because of the unique characteristics of a § 1983 action. See, *Rodriguez v. Avita*, 871 F.2d 514 (5th Cir. 1989); *Palmer v. San Antonio*, 810 F.2d 514 (5th Cir. 1987); *Morrison v. Baton Rouge*, 761 F.2d 242 (5th Cir. 1985) and; *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

In *Elliott*, the court explained that the lack of pleading with particularity “eviscerates important functions and protections of official immunity.” *Id.* at 1476. The *Elliott* case has a very generous discussion of this entire field of law and provides a listing of other circuit’s decisions requiring at least a minimum of specificity in the pleading of civil right’s complaints. *Id.* at 1479.

In *Elliott*, Judge Higginbotham wrote a brief but noteworthy concurring opinion. While Judge Higginbotham agreed with the majority opinion, he pointed out that he would have reached this destination by following a different path. Instead of mandating a “heightened pleading” requirement in cases involving a potential immunity defense, Judge Higginbotham would merely rule that a petition fails to state a cause of action against governmental officials unless it includes a statement of sufficient facts that, if

true, would demonstrate the absence of immunity. *Id.* at 1482. Judge Higginbotham added that it does no violence to the concept of notice pleading to suggest that the adequacy of a pleading is case specific. In other words, Judge Higginbotham would require that to state an action where immunity is potentially involved, the case must be stated with specificity.

In this concurring opinion Judge Higginbotham also explained that

Of course, some plaintiffs will be unable to state a claim without the benefit of discovery, even though discovery might have surfaced sufficient facts, but denial of some meritorious claims is the direct product of the immunity doctrine which weighed these losses when it struck the policy balance. This, at least for me, only makes the plainer that I am sure that I am on sure ground in concluding that the accommodation of notice pleading and immunity presents a question of claim definition, peculiarly within the authority granted to us by Art. III.

*Id.* at 1483.

Moreover, Judge Higginbotham would hold that the courts have the judicial authority to decide when a petition or complaint has been pleaded adequately to state a valid cause of action.

Petitioners cite *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990) on page 18 of their Petition for the proposition that the Fifth Circuit itself has acknowledged that application of the “heightened pleading” requirement may result in the dismissal of certain meritorious claims.

The language that Petitioners point to is located in footnote #2 on page 557 of the *Streetman* decision. Petitioners have taken the quote out of context for their own purposes. The entire footnote is as follows:

This court is not unsympathetic to the dilemma the contours of this doctrine create for some § 1983 plaintiffs. Because the doctrine prevents them from seeking discovery, they frequently cannot collect sufficient facts to defeat the defense at the pleading stage. In the persuasive concurring opinion to *Elliott*, discussed previously, Judge Higginbotham recognized these conflicting interests, and reluctantly concluded that 'denial of some meritorious claims is the product of the immunity doctrine which weighed these losses when it struck the policy balance.'

*Elliott*, 751 F.2d at 1483 (Higginbotham concurring).

Basically, what Judge Higginbotham was saying is that while some meritorious claims may be denied by the "heightened pleading" requirement this fact was known when the immunity doctrine was being developed and this is a necessary cost, worth paying, for the doctrine as a whole.

While *Elliott* dealt with immunity of public officials, the same rationale behind the decision applies equally to municipal liability in § 1983 cases. In *Palmer*, the first Fifth Circuit case to deal with a § 1983 action against a municipality, the court used the same reasoning that was used in *Elliott* in requiring § 1983 Plaintiffs to state specific facts and not merely conclusory allegations against a municipality.

In addition, the policy reasons behind this pleading standard are the same for cases involving public officials and municipalities. Without a higher pleading standard in municipal liability cases, municipalities would be haled into court in many instances when, under the substantive law of § 1983, these cases would eventually be thrown out because the Plaintiffs could not meet their burden of proof. This situation wastes both the taxpayer's money and scarce judicial resources. By adopting a heightened pleading standard at the outset, the Fifth Circuit is ensuring that

only truly meritorious § 1983 claims go forward, and that these meritorious claims are given the attention they rightfully deserve.

As the district court opinion correctly pointed out (R. 464), under the recent *Rodriguez* holding, boilerplate, conclusory allegations combined in a description of a single incident will not satisfy the pleading requirements for a § 1983 case. When dealing with a pleading no more generally worded than the one at hand, the Fifth Circuit in *Rodriguez* stated, "Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer — a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else." *Rodriguez*, 871 F.2d at 255.

In *Nieto v. San Perlita Independent School District*, 894 F.2d 174 (5th Cir. 1990), the Fifth Circuit addressed the rationale behind the doctrine of governmental immunity and the limitations of allowing offensive discovery by a claimant. The court stated that the "heightened pleading" obligation requires the plaintiff's complaint to state specific facts sufficient to overcome a qualified immunity defense. This requirement alleviates the defendants who may be entitled to official immunity from the burdens of traditional pretrial depositions, interrogatories and request for admissions. *Id.* at 178. Consequently, the court concluded, the plaintiff in a § 1983 suit must shoulder the burden of pleading a prima facie case, including the obligation of alleging detailed facts supporting the contention that a plea of immunity cannot be sustained. *Lynch v. Cannatella*, 810 F.2d 1363, 1376 (5th Cir. 1987), quoting *Morrison v. City of Baton Rouge*, 761 F.2d 242, 245 (5th Cir. 1985). *Nieto*, 894 F.2d at 178.

The *Nieto* court relied on United States Supreme Court authority to support the "heightened pleading" requirement by citing the case of *Mitchell v. Forsyth*, 472 U.S. 511 (1985) wherein the United States Supreme Court stated that "unless the plaintiff's allegations state a claim of violation of clearly estab-



lished law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 526. Furthermore, the Fifth Circuit held that once a complaint against an official adequately raises the likely issue of immunity, the district court should on its own authority require a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that a plea of immunity cannot be sustained. *Id.* at 178, citing *Elliott*, 751 F.2d at 1482.

In page 8 of the Petition for Writ of Certiorari, Petitioners state that it appeared that the Supreme Court would determine the validity of the "heightened pleading" requirement when it granted certiorari in *Siegart*, but eventually the U.S. Supreme Court affirmed the lower court's decision on other grounds. *Siegart v. Gilley*, 111 S.Ct. 1789, (1991). The *Siegart* court affirmed the lower court's decision by saying, "the court of appeals majority concluded that the District Court should have dismissed petitioner's suit because he had not overcome the defense of qualified immunity asserted by respondent. By a different line of reasoning, we reach the same conclusion, and the judgment of the Court of Appeals is therefore affirmed. *Id.* at 1794.

In *Siegart*, Justice Kennedy wrote a concurring opinion in favor of retaining the "heightened pleading" standard. Justice Kennedy's opinion stated in part:

I would affirm for the reasons given by the court of appeals. Here malice is a requisite showing to avoid the bar of qualified immunity. The "heightened pleading" standard is a necessary and appropriate accommodation between the state of mind, component of malice and the objective test that prevails in qualified immunity analysis as a general matter. [T]here is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the "heightened pleading" requirement is the most workable means to

resolve it. The "heightened pleading" standard is a departure from the usual pleading requirements of Fed. R. of Civ. P. 8 & 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Upon the assertion of a qualified immunity defense, the plaintiff must put forward specific, non-conclusory factual allegations which establish malice, or face dismissal.

*Siegart*, 111 S.Ct. at 1295

*Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied sub nom, Propst v. Weir*, 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) is cited by Petitioners on page 13 of the Petition for Writ of Certiorari for the proposition that the 5th Circuit's "heightened pleading" requirement has been rejected by the 7th Circuit Court of Appeals.

The Petitioners here are attempting to use this case on their behalf by stating that the 7th Circuit had "deprecated the heightened pleading requirement." In fact, the *Thomas* court does wrestle with the whole field of immunity and how it is best handled by the courts, but this same court does not openly reject the "heightened pleading" requirement. In fact, the court stated the following:

Like Justice Kennedy, See *Siegart*, 111 S.Ct. at 1795 (concurring opinion), we think that the best solution to the conundrum is to require the plaintiff to produce "specific, non-conclusory, factual allegations which establish [the necessary mental state] or face dismissal" unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.

*Thomas*, 937 F.2d at 344-345. The court goes on to list a long series of cases that have adopted and elaborated on this approach.

Thereafter, the court added that they "deprecate" the expression "heightened pleading requirement" and would rather speak of the minimum quantum of proof required to defeat the initial motion for summary judgment. It appears that the Seventh Circuit is not comfortable with the phrase "heightened pleading requirement" although this court does appreciate the need to conform with the ruling of the U.S. Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Harlow* amplifies the need to protect the rights of entities and persons who may enjoy immunity. A higher level of pleading than is ordinarily required by the Rules may be called for in immunity cases. This is evident by their agreement with Judge Kennedy in *Siegart* that the plaintiff is required to present specific and non-conclusory factual allegations.

Another Seventh Circuit decision, *Estate of Himelstein V. Ft. Wayne*, 898 F.2d 573 (7th Cir. 1990), required pleading of specific facts by a § 1983 claimant. When speaking of the pleading requirements for a civil rights claim the court held that:

A § 1983 claim does, indeed, require an allegation that some state actor deprived the plaintiff of a federal right. But, in order to state such a claim sufficiently, a plaintiff must allege facts that, if believed, would show that a federal right was actually violated. 42 U.S.C. § 1983 confers no substantive federal rights; rather, it is a remedial provision designed to afford redress for state deprivation of federal rights. Hence, no § 1983 action can be maintained until a federal right has actually been violated.

*Id.* at 575.

The Seventh Circuit upheld the dismissal of the lower court finding that the petitioners had failed to allege any facts in support of their claim that some federally guaranteed constitutional right had been violated.

## SEVERAL CIRCUIT COURTS REQUIRE FACT PLEADING OF § 1983 CLAIMANTS

In *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49 (1st Cir. 1990), the First Circuit Court of Appeals held that the plaintiff's pleadings did not state a cause of action under § 1983 and further stated that the district court did not abuse its discretion in failing to grant the plaintiff a request for leave to amend his complaint. In reaching this decision, the First Circuit held that:

Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions or outright vituperation . . . moreover, the Rule does not entitle the plaintiff to rest on "subjective characterizations" or conclusory descriptions of "a general scenario which could be dominated by unpleaded facts" . . . We understand, that for pleading purposes, the dividing line between sufficient facts and insufficient conclusions is "often blurred" . . . but the line must be plotted: it is only when conclusions are logically compelled, or at least supported by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that "conclusions" become "facts" for pleading purposes. . . . there is another principle at work as well. We have frequently recognized that, in cases where civil rights violations are alleged, particular care is required to balance the liberality of the civil rules with the need to prevent abusive and unfair vexation of defendants. . . . a civil rights complaint must "outline facts sufficient to convey specific instances of unlawful discrimination." . . . put another way, a plaintiff may not prevail simply by asserting an inequity and tacking on self-serving conclusions that the defendant was motivated by a discriminatory animus. The alleged facts must specifically identify the particu-



lar instances of discriminatory treatment and, as a logical exercise, adequately support the thesis that the discrimination was unlawful. . . . Discrimination based on unprotected characteristics or garden-variety unfairness will not serve.

*Id.* at 52-53.

It is clear from the *Correa-Martinez* decision that the 1st Circuit requires a fairly significant level of pleading before a plaintiff's civil rights allegation will rise to the level of stating a valid cause of action.

Similarly, in *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977), (1978) the First Circuit upheld a district court's dismissal of a plaintiff's cause of action due to the fact that the plaintiff had pleaded with nonspecific and conclusory claims. On page 643 of this decision, the First Circuit held that conclusory allegations were inadequate to state a claim and that in an effort to control frivolous conspiracy suits under § 1983, federal courts have come to insist that the complaint state with specificity the facts that in the plaintiff's mind show the existence and scope of the alleged conspiracy. It has long been the law that in this and other circuits, that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claim with references to material fact.

In *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2nd Cir. 1972) the Second Circuit upheld the dismissal of the plaintiff's complaint for failure to raise a federal question in the body of the pleadings. This court held that mere conclusory allegations do not provide an adequate basis for the assertion of a claim for violations of §§ 1983 and 1943. The court held that the allegations were conclusory in that they failed to supply adequate facts to bolster concluded allegations. The court reasoned that because the pleadings contained merely the end product of the allegation and not the component parts, that is, only the conclusions and not the facts that those conclusions were

based on that there was not adequate notice to inform the defendants of the basis of the charges.

In *Rotolo v. Charleroi*, 532 F.2d 920 (3rd Circuit 1976) the plaintiff filed suit under § 1983. Thereafter, the district court dismissed the complaint and the petitioner appealed to the 3rd Circuit. The Third Circuit, after reviewing this decision, reversed and remanded to the lower court saying that the plaintiff should be entitled to amend, but along the way did write the following regarding appropriate pleading levels.

In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in state courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims. Citing *Kauffman v. Moss*, 420 F.2d 1270, 1275-76 (3rd Cir. 1970).

*Rotolo*, 532 F.2d at 922.

In *District Counsel 47, American Federation v. Bradley*, 795 F.2d 310 (3rd Cir. 1986) several black probation officers filed employment discrimination claims alleging that they were the victims of discriminatory promotional examinations. The U.S. District Court for the Eastern District of Pennsylvania granted motions to dismiss these claims. The court of appeals vacated and remanded this decision holding that it was not necessary to the sufficiency of the complaint that plaintiff's identify each specific action taken by each individual plaintiff and secondly, that the district court should have at least granted plaintiff's leave to

amend their complaint. The Third Circuit decision speaks to the pleading requirements of civil rights complaints:

Generally, we should construe pleadings liberally . . . however, it is undisputed that this court has established a higher threshold of factual specificity for civil rights complaints . . . a substantial number of these cases are frivolous or should be litigated in the state courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in this litigation, and still keep the doors of the federal courts open to legitimate claims . . . We have said that “a civil rights complaint that relies on vague and conclusory allegations does not provide “fair notice” and will not survive a motion to dismiss.

*Id.* at 313.

In *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989) parents of a minor brought a § 1983 action against school officials claiming that the officials pressured their teenage daughter into having an abortion. The United States District Court granted a defense motion to dismiss for failure to state grounds upon which relief could be granted. Plaintiffs thereafter appealed to the 11th Circuit. The Circuit Court affirmed in part, reversed in part and remanded for further proceedings. Before reaching its decision, the court did provide some enlightening language regarding pleading § 1983 claims.

To state a claim for relief, Rule 8 of the Federal Rules of Civil Procedure merely requires “a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). It is well established that a complaint is

not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of the complaint’s allegations. *Id.* at 45, 78 S.Ct. at 101. Generally, the Federal Rules of Civil Procedure do not require a claimant to set forth in detail the facts upon which he bases his claim. *Id.* at 47, 78 S.Ct. at 102. Rather, cases in which the facts do not establish a true controversy are more properly disposed of through summary judgment. However, in an effort to eliminate non meritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases. *Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978). Typically, Rule 8 is applied more rigidly to allegations of conspiracy and absolute immunity, and to claims pled against a local government that the challenged conduct constitutes its official policy or custom.

*Arnold*, 880 F.2d at 310.

It is clear that while the Eleventh Circuit does not expressly adopt the phrase “heightened pleading” they, like several of the other circuits, require a higher than normal level of pleading to withstand a motion for dismissal in § 1983 cases.



### CONCLUSION

The Fifth Circuit correctly affirmed the district court's dismissal in favor of Defendant City of Grapevine, Texas because Plaintiffs failed to state a cause of action on which relief could be granted. The basic premise of Plaintiffs' complaint fails because they failed to factually state a claim under 42 U.S.C. § 1983.

For the reasons stated, the United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari, leave the judgments of the Fifth Circuit and district court undisturbed, with costs taxed to Petitioners.

Respectfully submitted,

FOWLER, WILES, NORTON  
& KEITH, L.L.P.

By: \_\_\_\_\_  
Kevin J. Keith  
David L. Benford  
1900 Cityplace Center  
2711 North Haskell  
Dallas, Texas 75202  
214/841-3000 Telephone  
214/841-3099 Telecopier

### CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing pleading has been forwarded to all counsel of record on this the \_\_\_\_ day of June, 1992.

\_\_\_\_\_  
Kevin J. Keith

IN THE  
**United States District Court**  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

GERALD ANDERT, ET AL,  
Plaintiffs,

vs.

GREG BEWLEY, ET AL,  
Defendants

CIVIL ACTION  
No. 4-91-068-

### MEMORANDUM OPINION and ORDER

This action was brought by Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, by and through his next friends Kevin Lealos and Jerri Lealos, Trevor Lealos, by and through her next friends Kevin Lealos and Jerri Lealos, Pat Lealos and Don Andert, plaintiffs, against defendants, Greg Bewley and Larry Traweck, on January 30, 1991, to obtain relief under 42 U.S.C. § 1983 for alleged violations by defendants of rights guaranteed to plaintiffs by the United States Constitution.

Plaintiffs alleged that defendants are police officers who participated in execution of a search warrant at premises occupied by the plaintiffs ("Lealos residence"). One of the two sets of plaintiffs who were involved in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 755 F.Supp. 726 (N.D. Tex. 1991), *aff'd* 924 F.2d 1054 (5th Cir. 1992), are the same persons who are the plaintiffs in this action; and the police activity involved in this action is the same police activity with which the court dealt as to these persons in *Leatherman*.

The sole theory of recovery alleged by plaintiffs against Greg Bewley was that he was a participant in the search of the Lealos

residence the evening of January 30, 1989, and that while so engaged he caused an injury to Gerald Andert by use of excessive force. The heart of the cause of action alleged against Greg Bewley is as follows:

**Liability Alleged Against Defendant Bewley**

15.

... Specifically, Plaintiff Gerald Andert alleges that the use of force by Defendant Bewley when seizing Plaintiff caused 1) a significant injury to Plaintiff, which 2) resulted directly and only from the alleged use of force that was clearly excessive to the need; and 3) that the excessiveness of the force used by Defendant Bewley was objectively unreasonable under the circumstances. *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (en banc).

16.

Plaintiff Gerald Andert further alleges that Defendant Bewley was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Bewley was therefore acting "under color of law" when he violated the Plaintiff's constitutional rights.

17.

To state a claim under 42 U.S.C. Section 1983 plaintiffs need only allege two things: 1) the violation of a constitutional right, and 2) that the person alleged to have violated their rights was acting under color of law. *Gomez v. Toledo*, 446 U.S. 634, 640 (1980). The United States Court of Appeals for the Fifth Circuit has modified *Gomez v. Toledo* to require that

Plaintiffs in Section 1983 actions anticipate the possibility of an affirmative defense based on qualified immunity, and in this connection the Fifth Circuit requires Section 1983 plaintiffs to plead the basis of their claims in a manner "sufficiently specific to remove the cloak of protection afforded by an immunity defense." *Geter v. Fortenberry*, 882 F.2d 167, 170 (5th Cir. 1989) ("*Geter II*")

18.

For the purposes of satisfying the pleading requirement referred to in the preceding paragraph, Plaintiff Gerald Andert would further allege that the actions taken by Defendant Bewley when seizing Plaintiff violated clearly established law in existence at the time which prohibited use of force which causes severe injury, is grossly disproportionate to the need for action under the circumstances, and which is inspired by malice rather than merely careless or unwise excess of zeal so that it amounts to an abuse of official power that shocks the conscience. *Mouille v. City of Live Oak*, 918 F.2d 548, 551 (5th Cir. 1990). Plaintiff Gerald Andert alleges that the stitches required to treat his head wound satisfies the "severe injury" element, and that in the absence of any resistance or provocation during the seizure by Plaintiff, that clearly established law would have provided an objectively reasonable officer in Defendant Bewley's position "with the ability reasonably to anticipate [that his] conduct [might] give rise to liability for damages." *Melear v. Spears*, 862 F.2d 117, 1183 (5th Cir. 1989).

Plaintiffs' Original Complaint at 6-8. As reflected by the trial evidence, Gerald Andert's claim of use by Greg Bewley of excessive force is related to a blow Greg Bewley struck on Gerald Andert's head with a flashlight immediately after Greg Bewley entered the residence in execution of the search warrant.

The heart of the liability allegations made by plaintiffs against Larry Traweck are as follows:

### Liability Alleged Against Defendant Traweek

19.

When the United States Congress enacted Title 42, it intended to create a remedy in damages in favor of any person who has been subjected to the deprivation of a federal constitutional or statutory right by another person, or a governmental entity, who when violating the United States Constitution or laws has acted "under color of law." All Plaintiffs named herein allege Defendant Traweek is liable to them for the right to be free from unreasonable seizure protected by the Fourth Amendment, as alleged herein at paragraph 14. These Plaintiffs base their right to recovery from Defendant Traweek on the remedy created by the United States Congress when it enacted Title 42, United States Code, Section 1983.

20.

All Plaintiffs herein further allege that Defendant Traweek was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Traweek was therefore acting "under color of law" when he violated the Plaintiffs' constitutional rights.

21.

For the purpose of satisfying the pleading requirement of the United States Court of Appeals for the Fifth Circuit requiring plaintiffs to anticipate possible assertions of an affirmative defense based on qualified immunity, referred to herein at paragraph 17, the Plaintiffs alleging liability against Defendant Traweek would respectfully allege further that under clearly established law in existence when Defendant Traweek took the

actions challenged by Plaintiffs, that a reasonable officer would have known that to detain and interrogate individuals inside a private residence for one and one half hours, after discovering beyond a reasonable doubt that no legal basis existed for such detention or interrogation, would likely "give rise to liability for damages." *Melear v. Spears*, 862 F.2d 117, 1183 (5th Cir. 1989).

*Id.* at 9-10. The trial evidence provided specificity in the form of testimony that while at the scene of the search Larry Traweek explained to occupants of the residence the reason for the search, was present in something of a supervisory capacity, did not engage in significant, if any, search himself, and did not cause the presence of the officers at the residence to be terminated at an earlier time.

Plaintiffs do not contest validity of the search warrant. It was issued on the basis of an affidavit of a police officer stating that the affiant was of the belief that at the Lealos residence there were "controlled substances and chemicals used to manufacture controlled substances." Defendants' ex. 6 at 1. The search warrant itself commanded search of the Lealos residence, "including all other structures, and places on the premises," for controlled substances "alleged to be kept and concealed." Defendants' ex. 4.

Plaintiffs do not seek by their complaint recovery from any person other than Greg Bewley and Larry Traweek, the sole defendants, nor do plaintiffs allege any theory of liability against Bewley or Traweek, other than the theories mentioned above. No liability was sought by the complaint to be imposed on Bewley or Traweek for the conduct of other persons involved in the execution of the search warrant.

The case was tried to the jury, commencing on April 20, 1992. After plaintiffs announced that they had rested, except for an offer of proof by one witness on the issue of damages only and the making of a "bill", Larry Traweek moved for motion for judgment



as a matter of law, as contemplated by Fed. R. Civ. R. 50(a). The court granted the motion because of the court's conclusion that plaintiffs had been fully heard with respect to all issues related to their liability claims against Larry Traweck and that, nonetheless, there was no legally sufficient evidentiary basis for a reasonable jury to have found for plaintiffs against Larry Traweck on the theory of recovery urged by plaintiffs against him. The court has concluded that plaintiffs failed to present evidence raising a case of liability against Larry Traweck because they failed to adduce any evidence that any injury suffered by any of the plaintiffs resulted from any conduct on the part of Larry Traweck that was objectively unreasonable or that was of an excessive nature or beyond that in which a reasonable officer, faced with the same situation facing Larry Traweck on the occasion in question, would have engaged. Moreover, the court has concluded from the evidence received during plaintiffs' trial presentation that the conduct of Larry Traweck was subject to the qualified immunity defense, as it is explained in *Mouille v. City of Live Oak*, 918 F.2d 548, 551-52 (5th Cir. 1990). Because the conduct in question occurred prior to the opinion of the Supreme Court in *Graham v. Conner*, 490 U.S. 386 (1989), the standards set forth in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A January 1981), are applicable to the qualified immunity inquiry. Evidence adduced during plaintiffs' case made clear that Larry Traweck's conduct on the occasion in question was not "grossly disproportionate to the need for action under the circumstances" and that it was not "inspired by malice . . . that it amounted to an abuse of official power that shocks the conscience. . . ." *Mouille*, 918 F.2d at 551.

The case of plaintiffs against Greg Bewley went to the jury for resolution of disputed facts by a special verdict as contemplated by Fed. R. Civ. P. 49(1). The jury found against plaintiffs on the first of a series of questions inquiring about existence of the elements of an excessive force cause of action, as such a cause of action is defined in *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir.

1989). See also *Mouille*, 918 F.2d at 551. The jury's answer to Question No. 1 was that the jury was unable to find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head was a use by Greg Bewley of force that was clearly excessive to the need existing on the occasion in question. This jury finding compels entry of judgment in favor of Greg Bewley against Gerald Andert. Moreover, the jury found in answer to Question No. 5 that Greg Bewley's conduct in striking Gerald Andert was qualified immune. The court recognizes that the issue of qualified immunity normally is an issue of law to be determined by the court. In this case, there is uncertainty as to whether disputed fact elements exist as to the qualified immunity defense. If the matter was proper for resolution by the jury, the jury has resolved it in favor of Greg Bewley. If the conclusion were to be reached that the issue is one to be resolved by the court as a legal proposition, the court would conclude that the conduct of Greg Bewley about which Gerald Andert complains was qualified immune. The only reasonable conclusion that could be reached from the evidence is that Greg Bewley was not inspired by malice. While carelessness or unwise excess of zeal might be present (though the court is not saying that it is), there clearly was no malice on Greg Bewley's part and there certainly was no conduct on his part that "amounted to an abuse of official power that shocks the conscience." *Mouille* 918 F.2d at 551.

For the reasons given above, judgment should be entered for defendants, denying plaintiffs any recovery against either of them.

THE COURT SO ORDERS.

SIGNED April 21, 1992.

---

JOHN McBRYDE  
United States District Judge



IN THE  
**United States District Court**  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

GERALD ANDERT, ET AL,  
*Plaintiffs,*

vs.

GREG BEWLEY, ET AL,  
*Defendants*

CIVIL ACTION  
No. 4-91-068-

**FINAL JUDGMENT**

Consistent with the memorandum opinion and order signed by the court on this date,

The court ORDERS, ADJUDGES and DECREES that Plaintiffs, Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, by and through his next friends Kevin Lealos and Jerri Lealos, Travor Lealos, by and through her next friends Kevin Lealos and Jerri Lealos, Pat Lealos and Don Andert, have and recover nothing from defendants, Greg Bewley and Larry Traweek, that plaintiffs' causes of action against defendants be, and are hereby, dismissed, and that defendants each have and recover costs of court incurred by them from plaintiffs, jointly and severally.

SIGNED April 21, 1992.

---

JOHN McBRYDE  
United States District Judge

IN THE  
**United States District Court**  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

GERALD ANDERT, ET AL,  
*Plaintiffs,*

vs.

GREG BEWLEY, ET AL,  
*Defendants*

CIVIL ACTION  
No. 4-91-068-

**VERDICT OF THE JURY**

We the Jury, return our answers to the following questions as our verdict in this case.

**QUESTION NO. 1:**

Do you find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head constituted a use of force by Greg Bewley that was clearly excessive to the need existing on the occasion in question, taking into account all facts and circumstances existing at the time the force was used?

Answer "Yes" or "No."

**ANSWER: NO**

If you answered Question No. 1 "Yes," then answer Question No. 2; otherwise, do not answer Question No. 2.

**QUESTION NO. 2:**

Do you find from a preponderance of the evidence that the excessiveness of the force that was used by Greg Bewley in striking Gerald Andert on the head, if you have so found, was objectively unreasonable?

You are instructed that in determining whether the excessiveness of the force used by Greg Bewley in striking Gerald Andert on the head was "objectively unreasonable," you shall consider the matter from the standpoint of a reasonable officer on the scene, faced with the same circumstances that actually existed at the time, without regard to Greg Bewley's underlying intent or motivation, rather than with the 20/20 vision of hindsight, and you will allow for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Answer "Yes" or "No."

ANSWER: \_\_\_\_\_

If you have answered Question No. 2 "Yes," then answer Question No. 3; otherwise, do not answer Question No. 3.

#### QUESTION NO. 3:

Do you find from a preponderance of the evidence that Gerald Andert sustained a significant injury as a direct result, and only from the use of, the excessive force you have found to exist in answer to question No. 1?

Answer "Yes" or "No."

ANSWER: \_\_\_\_\_

If you have answered Question No. 3 "Yes," then answer Question No. 4; otherwise, do not answer Question No. 4.

#### QUESTION NO. 4:

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would fairly and reasonably compensate Gerald Andert for his damages, if any, which were a direct and proximate result of the force used by Greg Bewley in striking Gerald Andert on the head?

You are instructed that in answering Question No. 4 you shall take into account any physical pain and suffering and mental anguish you find from a preponderance of the evidence Gerald Andert sustained by reason of the force used by Greg Bewley in striking him on his head, and nothing else.

Answer in dollars and cents, or "None," in the blank space provided below.

ANSWER: \_\_\_\_\_

#### QUESTION NO. 5:

Do you find from a preponderance of the evidence that Greg Bewley's conduct in striking Gerald Andert on the head was qualified immune?

You are instructed that an officer's conduct is "qualified immune" if a reasonable officer, situated as Greg Bewley was situated on the occasion in question, could have concluded that his conduct did not violate Gerald Andert's right to be free from excessive force. You are further instructed that on the occasion in question Gerald Andert's right to be free from excessive force was to be free from severe injuries inflicted on him by a force that was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely carelessness or unwise excess of zeal, so that it amounted to an abuse of official power that shocks the conscience. You are further instructed that "malice" exists if the actor acts with evil motive or intent, or recklessly or with callous indifference to the injured party's right to be free from the use of excessive force during the course of a search and seizure.

Answer "Yes" or "No."

**ANSWER: Yes**

4/21/92

(Date)

FOREPERSON

4/21/92

(Date)

JOHN McBRYDE

United States District Judge



5  
No. 91-1657

In The  
Supreme Court of the United States  
October Term, 1991

Supreme Court, U.S.

FILED

JUN 1 1992

OFFICE OF THE CLERK

---

Charlene Leatherman, et al.  
*Petitioners,*

vs.

Tarrant County Narcotics Intelligence  
and Coordination Unit, et al.,  
*Respondents.*

---

On Petition for Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

---

*City of Lake Worth, Texas' Brief in Opposition*

---

TIM G. SRALLA

WAYNE K. OLSON \*

Members of the Firm of:  
FIELDING, BARRETT & TAYLOR  
8851 Highway 80 West, Suite 300  
Fort Worth, Texas 76116-6041  
(817) 560-0303  
Fax No. (817) 560-3953

ATTORNEYS FOR RESPONDENT  
CITY OF LAKE WORTH

---

\* Attorney of Record

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

**QUESTIONS PRESENTED**

1. May a complaint against a local governmental entity brought under 42 U.S.C. section 1983 be dismissed for failure to plead specific factual allegations supporting governmental liability?
  - a. Whether dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure of an action brought pursuant to 42 U.S.C. section 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. section 2072(b)?
  - b. Whether a complaint will withstand a motion to dismiss brought pursuant to Rule 12(b)(6), even though it contains only conclusory allegations that track the requirements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?

## TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED . . . . .	i
TABLE OF AUTHORITIES . . . . .	iii
JURISDICTIONAL STATEMENT . . . . .	vi
STATUTES AND RULES INVOLVED . . . . .	vii
LIST OF PARTIES . . . . .	ix
STATEMENT OF THE CASE . . . . .	1
SUMMARY OF THE ARGUMENT . . . . .	8
ARGUMENT . . . . .	10
CONCLUSION . . . . .	18

## TABLE OF AUTHORITIES

CASES	PAGE
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) . . . . .	16
<i>Arnold v. Board of Education</i> , 880 F.2d 305 (11th Cir. 1989) . . . . .	15
<i>Arnold v. Jones</i> , 891 F.2d 1370 (8th Cir. 1989) . . . . .	15
<i>Bryan v. Stillwater Board of Realtors</i> , 578 F.2d 1319 (10th Cir. 1977) . . . . .	22
<i>Challenger v. Local Union No. 1 of Intern. Bridge, Structural, and Ornamental Iron Workers, AFL-CIO</i> , 619 F.2d 645 (7th Cir. 1980) . . . . .	21
<i>City of Canton v. Harris</i> , 109 S. Ct. 1197 (1989) . . . . .	11, 12, 13
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985) . . . . .	11
<i>City of St. Louis v. Praprotnik</i> , 108 S. Ct. 915 (1988) . . . . .	10, 11
<i>Collinson v. Gott</i> , 895 F.2d 994 (4th Cir. 1990) . . . . .	15
<i>Elliott v. Foufas</i> , 867 F.2d 877 (5th Cir. 1989) . . . . .	19
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) . . . . .	15, 26



<i>Fisher v. Flynn</i> , 598 F.2d 663 (1st Cir. 1979) . . . . .	15
<i>Hall v. Pennsylvania State Police</i> , 570 F.2d 86 (3rd Cir. 1978) . . . . .	15
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1987) . . . . .	16
<i>Leatherman v. Tarrant County Narcotics Intelligence, and Coordination Unit</i> , 954 F.2d 1054 (5th Cir. 1992) . . . . .	13
<i>McGregor v. Industrial Excess Landfill, Inc.</i> , 856 F.2d 39 (6th Circuit 1988)(per curiam) . . . . .	20
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) . . . . .	16
<i>Mitchell v. King</i> , 537 F.2d 385 (10th Cir. 1976) . . . . .	22
<i>Monell v. Department of Social Services of the City of New York</i> , 436 U.S. 658 (1978) . . . . .	10, 17
<i>Morrison v. City of Baton Rouge</i> , 761 F.2d 242 (5th Cir. 1985) . . . . .	26
<i>Nuclear Transport &amp; Storage, Inc. v. United States</i> , 890 F.2d 1348 (6th Cir. 1989) . . . . .	15
<i>Ostrer v. Aronwald</i> , 567 F.2d 551 (2d Cir. 1977) . . . . .	15
<i>Palmer v. City of San Antonio</i> , 910 F.2d 514 (5th Cir. 1987) . . . . .	13, 14

<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469 (1986) . . . . .	10, 11
<i>Pueblo Neighborhood Health Centers, Inc. v. Losavio</i> , 847 F.2d 642 (10th Cir. 1988) . . . . .	15
<i>Rakovich v. Wade</i> , 850 F.2d 1180 (7th Cir. 1988), <i>cert. denied</i> , 488 U.S. 968 (1988) . . . . .	15
<i>Siegert v. Gilley</i> , 895 F.2d 797 (D.C. Cir. 1990), <i>affirmed</i> , 111 S. Ct. 1789 (1991) . . . . .	14
<i>Tamari v. Bache &amp; Co. (Lebanon) S.A.L.</i> , 565 F.2d 1194 (7th Cir. 1977) <i>cert. denied</i> , 435 U.S. 903 (1978). . . . .	21
<i>Uston v. Airport Casino, Inc.</i> , 564 F.2d 1216 (9th Cir. 1977) . . . . .	15
<i>Western Mining Council v. Watt</i> , 643 F.2d 618 (9th Cir. 1981) <i>cert. denied</i> , 454 U.S. 103 (1981) . . . . .	22

### **JURISDICTIONAL STATEMENT**

This respondent does not challenge the statutory provision on which Petitioners rely for jurisdiction, nor is the timeliness of the petition questioned.

### **STATUTES AND RULES INVOLVED**

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

**(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain \*\*\* (2) a short and plain statement of the claim showing that the pleader is entitled to relief, \*\*\*

**(e) Pleading to be Concise and Direct: Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

**(f) Construction of Pleadings.**

All pleadings shall be so construed as to do substantial justice.

The Rules Enabling Act, Title 28, United States Code, Section 2072 provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge  
or modify any substantive right. \*\*\*

## LIST OF PARTIES

### PETITIONERS

Charlene Leatherman and Kenneth Leatherman,  
individually and as next friend of Travis Leatherman;  
Gerald Andert; Kevin Lealos and Jerri Lealos, individually  
and as next friend of Travor Lealos and Shane Lealos,  
Pat Lealos, and Donald Andert.

### RESPONDENTS

The Tarrant County Narcotics Intelligence and  
Coordination Unit; Tarrant County, Texas; Tim Curry, in  
his official capacity, and Don Carpenter, in his official  
capacity; City of Lake Worth, Texas; and City of  
Grapevine, Texas.



## STATEMENT OF THE CASE

Petitioners Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman (collectively referred to as the "Leatherman" plaintiffs, alleged, in their complaint, inter alia, that Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"), Tarrant County, Texas ("Tarrant County") and the City of Lake Worth, Texas (the "Lake Worth") violated their constitutional rights in connection with Respondents' search of their residence. The allegations against these three Respondents stem from the shooting of Petitioners' dogs during the search.

The District Court initially considered a motion filed by TCNICU pursuant to Rule 12(b)(6) to dismiss the original complaint. The District Court, the Honorable David Balew presiding, dismissed the complaint for failure to state a claim, but later vacated the dismissal and provided the Leatherman plaintiffs with additional time to amend to cure the inadequacies. The basis of this dismissal was that the Leatherman plaintiffs had failed to allege any facts to support the existence of a policy or custom which would overcome the defendant governmental entities' absolute immunity, and subject

them to liability. In its opinion, the District Court specifically directed the plaintiffs' attention to the Fifth Circuit's heightened pleading requirement for 1983 cases.

In order to attempt to cure the deficiencies in the complaint, the Leatherman plaintiffs added Gerald Andert, Kevin Andert, Kevin Lealos and Jerri Lealos, individually and as next friends of Travor and Shane Lealos, Pat Lealos, and Donald Andert (collectively the "Andert plaintiffs"), and new defendants, Tim Curry and Don Carpenter, in their official capacities as Director of the TCNICU and Sheriff of Tarrant County, respectively, and the City of Grapevine ("Grapevine"). Petitioners added the Andert incident in an apparent attempt to show that the Leatherman search was not an isolated incident, and establish the existence of a governmental policy.

TCNICU, Curry, Carpenter and Grapevine moved to dismiss, again pursuant to Rule 12(b)(6), and the District Court, the Honorable John McBryde now presiding, again dismissed the Petitioners' complaint as to all the defendants. The District Court noted that Petitioners still had pleaded the existence of a custom or policy only in the most conclusory terms, and did not

inform the Respondents as to what training policy the Respondents had allegedly failed to implement. Nor did Petitioners provide any allegation as to how the Respondents had been "deliberately indifferent" to the Petitioners' Constitutional rights. For these reasons, the District Court determined that dismissal was appropriate.

The District Court also ruled that, assuming dismissal pursuant to Rule 12(b)(6) was not proper, summary judgment under Rule 56 was appropriate, given that Petitioners had failed to come forward with any evidence whatsoever that any of the actions alleged to have been taken by the officers in question were taken because of the existence of governmental policy or custom.

Petitioners' defense to summary judgment was that they should be granted more time to discover the existence of such a policy. With regard to Lake Worth, Petitioners never initiated any discovery whatsoever, however, despite having over seven months to do so. Not surprisingly, the District Court was not persuaded by Petitioners' argument, ruling that Petitioners had been provided sufficient time for discovery, and that, in order to justify the initial filing of a their action, they should

have been able to identify some facts which would have warranted a conclusion that such a policy existed, since that is one of the predicates to stating a valid action under 42 U.S.C. § 1983.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on the grounds that Petitioners' complaint failed to allege any specific facts to support its claims that the Respondents had a policy of inadequate training, as required by the heightened pleading requirement adopted by the Fifth Circuit. It specifically did not address the remainder of the reasons for the District Court's dismissal.

Petitioners' First Amended Complaint alleged in relevant part:

the search of the Leatherman's home was planned and carried out by law enforcement officers employed by or under the control of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth.

(Paragraph 17). Petitioners thereafter alleged that: the shooting of their family dogs on the occasion in question by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their effects against unreasonable seizure as protected by

the Fourth Amendment to the United States Constitution \*\*\*

(Paragraph 21), and that:

the manner in which the search of their home was carried out by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth deprived them of their right to be secure in their house against unreasonable searches as protected by the Fourth Amendment to the United States Constitution.

(Paragraph 22). The Petitioners' complaint sets forth absolutely no factual allegations regarding Lake Worth's alleged participation in any actions which may have constituted an invasion of their constitutional rights. Based solely upon the above allegations, Petitioners thereafter asserted, again in conclusory allegations only, that:

Defendant City of Lake Worth is liable to [the Leatherman plaintiffs] pursuant to 42 U.S.C. § 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of law; that Defendant City of Lake

Worth failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violations alleged in paragraph 21.

(Paragraph 25) Petitioners further asserted that:

Defendant City of Lake Worth is liable to Plaintiffs pursuant to 42 U.S.C. § 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of State law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which

search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 22.

(Paragraph 28).

## SUMMARY OF THE ARGUMENT

The petition of writ of certiorari should not be granted because the Petitioners' complaint failed to meet either the Fifth Circuit's heightened pleadings requirement for civil rights actions brought pursuant to 42 U.S.C. section 1983, or the constraints of Federal Rule of Civil Procedure 8(a).

Plaintiffs' complaint contained only a conclusory allegation that the actions complained of were taken pursuant to a custom or policy of Lake Worth. The existence of an unconstitutional municipal policy is a necessary element of a claim under 42 U.S.C. section 1983 brought against a municipality, and without showing the existence of such a policy, Petitioners' complaint against Lake Worth was properly dismissed under Federal Rule of Civil Procedure 12(b). Any other result would be inconsistent with a municipality's absolute immunity from suit, as well as liability, absent a showing of the existence of such a policy.

The Fifth Circuit's holding does not conflict with Federal Rule of Civil Procedure 8(a), because Rule 8(a) expressly provides that the plaintiff must include in the complaint a statement of the claim showing that the plaintiff is entitled to relief. Merely including



conclusory allegations tracking the elements of the cause of action does not show that a plaintiff is entitled to relief, and such conclusory allegations have consistently been held to be deficient under Rule 8 and subject to dismissal under Rule 12.

Lastly, the Fifth Circuit's holding does not violate the Rules Enabling Act, 28 U.S.C. section 2072, because the Fifth Circuit's holding in no way abridged Petitioners' substantive legal rights. Rather, it simply dictates the procedural requirements placed upon a plaintiff stating a cause of action under 42 U.S.C. section 1983.

## ARGUMENT

**Municipal liability under 42 U.S.C. section 1983 is limited to actions taken pursuant to municipal policy.**

A municipality is liable under 42 U.S.C. section 1983 only when the municipality itself has violated a person's constitutional rights pursuant to an official policy statement, ordinance, regulation or decision. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Under *Monell*, recovery from a municipality is limited to acts "of the municipality." *Id.* at 694. A municipality may only be held liable for acts which it has officially sanctioned or ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Thus, a municipality may not be held liable under section 1983 unless Petitioners establish the existence of an unconstitutional municipal policy. *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988). Based upon these authorities, in order for Petitioners to state a claim against Lake Worth, they had to adequately plead the existence of a specific unconstitutional policy which was enacted or implemented by Lake Worth.

This Court has specifically noted that there are only "limited circumstances" in which an allegation of failure to train can be the basis for liability under section 1983.

*City of Canton v. Harris*, 109 S. Ct. 1197 (1989).

The necessary requisites to establish the existence of a policy of inadequate training, as is alleged in this case, were discussed in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, this Court specifically rejected the premise that municipal policy imputing liability could be inferred from a single isolated act by a police officer. In holding that an unjustified shooting by a police officer, without more, does not result from official policy, the *Tuttle* court noted that "\*\*\*it is therefore difficult in one sense even to accept the submission that someone pursues a policy of inadequate training, unless evidence be adduced which proves that the inadequacies resulted from conscious choice — that is, proof that the policymakers deliberately chose a training program that would prove inadequate." 471 U.S. at 823. This rationale is obviously consistent with the holding in *Monell*, and has since consistently been upheld. See, e.g., *Praprotnik*, 108 S. Ct. at 915; *Pembaur*, 475 U.S. at 469.

Moreover, this Court stated that inadequate police training "\*\*\*may serve as a basis for Section 1983 liability only where the a failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact." *Harris*, 109 S.Ct. at 1204.

**Petitioners' First Amended Complaint fails to show the existence of a municipal policy.**

Petitioners' First Amended Complaint fails to show the existence of a policy which has been formally adopted by or officially sanctioned or ordered by any policymakers for the City of Lake Worth. Specifically, Petitioners pleaded that the search of the Leatherman residence was planned and carried out by law enforcement officers employed by or under the control of Respondents TCNICU, Tarrant County and City of Lake Worth. Nowhere in Petitioners' complaint is there any allegation of what specific actions were carried out by officers of Lake Worth. There are no allegations that Lake Worth's officers, as opposed to officers of TCNICU or Tarrant County, entered and searched the Leathermans' residence. There are no specific allegations that Lake Worth's officers shot the Leathermans' dogs during the search. There are simply no allegations of any specific involvement by Lake Worth in the Leatherman "incident", and no showing of the existence of any municipal policy of Lake Worth, other than Petitioners' conclusory statement that Lake

Worth failed to formulate and implement an adequate policy to train its officers. Neither can Petitioners rely upon the Andert incident to show the existence of such a policy. The complaint clearly acknowledges that no Lake Worth officers were present or participated in the search of the Andert residence.

**The Fifth Circuit's application of a "heightened pleadings" requirement under Rule 8 is appropriate in cases such as the one at bar.**

The Fifth Circuit analyzed these "bare bones" statements and determined that they were at best mere conclusory allegations which were not sufficient to sustain a section 1983 cause of action against Lake Worth. In so doing, the Fifth Circuit specifically applied a heightened pleading standard to the bare bones allegations in Petitioners' complaint. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992) (citing *Palmer v. City of San Antonio*, 910 F.2d 514 (5th Cir. 1987)). Under Fifth Circuit authority, a complaint against a municipality must specifically identify: (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a Constitutional right. *Palmer*, 910 F.2d at 516. Under *Palmer*, even assuming arguendo that Petitioners' allegations

were sufficient to allege action by the police officers of Lake Worth, the Fifth Circuit held that where a lawsuit brought against a municipality is predicated on inadequate training of its police officers, there has to be shown at least a pattern of similar incidents in which citizens were injured in order to establish the official policy requisite to municipal liability under section 1983. *Id.* at 518. Since Petitioners did not allege that Lake Worth police officers were involved in the Andert incident, which was obviously added to the complaint in an attempt to meet this requirement, and since there was no other showing made of the existence of a policy, the minimum requirements for stating a claim clearly were not met. Petitioners' argument that the Fifth Circuit's heightened pleading requirement violates Rule 8 has no merit. The Fifth Circuit rule is consistent with precedents set by almost all other Circuit Courts of Appeal. Whether they have articulated the rule as a "heightened pleading" standard, or simply as application of the requirements of Rule 8, most of the Circuits have applied a similar requirement in civil rights cases. See e.g., *Siebert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed*, 111 S. Ct. 1789 (1991) (adopting heightened



pleading requirement); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaints must do more than state simple conclusions); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2nd Cir. 1977) (complaints containing only conclusory, vague or general allegations are insufficient) *Hall v. Pennsylvania State Police*, 570 F.2d 86, 89 (3rd Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990) (adopting heightened pleading requirement); *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) (adopting heightened pleading requirement); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989) (adopting heightened pleading requirement); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) (mere conclusory allegations are insufficient to state claim); *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989) (adopting heightened pleading requirement); *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (complaint must contain specific factual allegations to support claim of conspiracy); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988) (adopting heightened pleading requirement); *Arnold v. Board of Education*, 880 F.2d

305 (11th Cir.1989) (Rule 8 is applied more rigidly to claims alleging official policy or custom of a local government).

The Fifth Circuit's pleading requirements are also consistent with this Court's holdings. For example, the heightened pleadings requirement has also been applied to section 1983 qualified immunity defenses pursuant to this Court's rulings in *Harlow v. Fitzgerald*, 457 U.S. 800 (1987) and *Anderson v. Creighton*, 483 U.S. 635 (1987), recognizing the applicability of "objective" immunity tests in order to protect governmental officials from the burdens of trial and litigation. *Harlow* and its progeny clearly recognize that significant policy considerations exist for not subjecting government officials entitled to qualified immunity to the costs, burdens and fears of being sued. In other words, this Court has emphasized that good faith immunity embraces not only a defense to personal liability, but also an "immunity from suit." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Just as *Harlow* and *Mitchell v. Forsyth* recognized that mere allegations of wrongdoing would not defeat a claim of good faith immunity, so too did *Monell* recognize that "a local government may not be sued under section 1983 unless the unconstitutional



deprivation can be attributed to municipal policy. 432 U.S. at 694 (emphasis supplied). This is only logical. The justifications for protecting individual officers entitled to qualified immunity from costs and burdens of frivolous lawsuits are equally applicable to governmental entities entitled to absolute immunity. The heightened pleading requirement adopted by the Fifth Circuit simply enforces these same policy considerations by preventing meritless lawsuits in cases brought against governmental entities entitled to absolute immunity from suit. Just as in cases of qualified immunity, where a mere conclusory allegation of bad faith is not sufficient to defeat a government official's qualified immunity, a complaint against a governmental entity must meet a similar threshold, in order to state a claim under section 1983, specifically the existence of a municipal policy. To adopt any other rule would eviscerate the immunity from suit that governmental entities have under the law, because a plaintiff could simply file a complaint alleging the existence of a policy, without any actual information regarding the existence of such a policy, in the blind hope of discovering through his suit some evidence upon which to base his claim. Such a result is

inconsistent with the grant of immunity. It is also inconsistent with this Court's previous statement that a claim against a municipality is not established "by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible." *Harris*, 109 S. Ct. at 1205.

**Application of the "heightened pleadings" requirement is not necessary to sustain dismissal of Petitioners' claim against Lake Worth.**

Even assuming, however, that application of a "heightened pleading" requirement is not warranted, dismissal was still appropriate. It is true that Rule 8 generally allows "notice pleadings", but what constitutes "notice" is a flexible concept, and has been kept so to ensure that pleadings requirements can be construed to do "substantial justice". Whatever "notice pleadings" are, however, it is at least clear that Rule 8 entitles a defendant to be accorded fair notice of the basis for the claim against it. Given that municipalities are accorded absolute immunity unless the existence of a policy or custom is shown, and given that this principle affords municipalities immunity from suit as well as from liability, a plaintiff should be required to show by its pleadings that it has a claim which, if proven, would

support a judgment against the defendant.

Whether the term "heightened pleading" standard is used is not controlling. In numerous cases applying Rule 8, courts have required the plaintiffs to plead the factual basis for their claims. In some cases, such as the one at bar, they have articulated a "heightened pleading" standard. Similarly, the Fifth Circuit has required specific factual allegations be contained in any complaint asserting a cause of action under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. section 1962. In so ruling, the Fifth Circuit determined that the order was entirely consistent with what the requirements of Rule 8 that pleadings contain a plain statement of the claim and pleadings be direct and concise. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). In other cases, courts have reached similar results based solely upon the dictates of Rule 8, without reference to any "heightened pleadings" standard.

For example, the Sixth Circuit affirmed dismissal of a cause of action brought pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. sections 6972 and 6973, and the Comprehensive Environmental Response Compensation and Liability

Act ("CERCLA"), 42 U.S.C. sections 9606 and 9607(a). In so holding, the Court noted that the plaintiff had alleged that they had incurred certain "response costs", a necessary predicate to an action under CERCLA. The Sixth Circuit rejected the plaintiff's argument that this was a sufficient pleading under Rule 8(a), however, noting that Rule 8(a) at least requires that the plaintiff include a short and plain statement of the claim showing that the pleader is entitled to relief, and this requires that the plaintiff give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The court noted that implicit in this requirement is a statement of the circumstances, occurrences and events upon which the claim is based. *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42 (6th Circuit 1988) (per curiam). The Court pointed out that the plaintiff's complaint failed to alleged any factual basis for the conclusory allegation that they had incurred response costs, and accordingly affirmed the dismissal. *Id.*

The Seventh Circuit reached a similar conclusion, and affirmed Rule 12(b) dismissals in the face of similar conclusory allegations, noting that under Rule 8, while well pleaded factual allegations are to be taken as

admitted for Rule 12(b) purposes, mere unsupported conclusions are not, and such are insufficient to avoid dismissal. See, e.g. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194, 1198 (7th Cir. 1977) *cert denied*, 435 U.S. 905 (1978); and *Challenger v. Local Union No. 1 of Intern. Bridge, Structural, and Ornamental Iron Workers, AFL-CIO*, 619 F.2d 645, 648-49 (7th Cir. 1980). In *Challenger* the Court determined that allegations that the defendants had breached their fiduciary duties, which allegation was being used to support a cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381, was insufficient to withstand a motion to dismiss. The court noted that the bald conclusion that the defendants had breached their fiduciary duty was insufficient, because a motion to dismiss admits allegations of fact, but not legal conclusions. *Id.* at 649.

The Ninth Circuit also adopted a similar position regarding the proper construction of Rule 8. For example, in a case wherein the plaintiffs sought a declaratory judgment rendering the Federal Land Policy and Management Act of 1976, 43 U.S.C. sections 1701-1782, unconstitutional, the court affirmed dismissal under Rule 12(b)(6), also stating that the court will not

presume the truth of a legal conclusion in the complaint, and that the plaintiff is required to plead factual allegations in support of their claim. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

The Tenth Circuit has construed Rule 8 in the same fashion, noting that on a motion to dismiss, facts that are well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged to support them. *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977); *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976).

In none of these cases did the courts' holdings turn on application of a "heightened pleading" requirement. Instead, the courts were guided by the language of Rule 8 itself, which imposes a duty on the plaintiff to at least provide the defendant with a short and plain statement of the claim *showing* that the pleader is entitled to relief. Petitioners' pleadings in this case did not show that they were entitled to relief. Instead, Petitioners did nothing more than track verbatim the language of this Court as to what the prerequisite for stating a case under section 1983 required. Moreover, as previously



pointed out, they also failed to allege any series of incidents involving Lake Worth which could arguably have supported an inference of the existence of a municipal policy. Thus, they accorded Lake Worth absolutely no notice as to the nature of the claim whatsoever, and failed to comply with the minimum dictates of Rule 8.

The interpretation of Rule 8 proposed by Petitioners would allow the filing of purely frivolous claims and permit prospective litigants to troll the waters of the courthouse, casting their nets indiscriminately in the blind hope of "catching a big one." Unfortunately, such a rule would also result in the inconveniencing of numerous parties against whom the plaintiff has no colorable claim, who then are put to the expense of needlessly defending a case and responding to discovery while the plaintiff determines whether they have a case or not. Such a rule certainly would not do substantial justice.

Petitioners' response to this argument has been that requiring a plaintiff to plead more than conclusory allegations will prevent some plaintiffs from discovering whether they have a claim, and so result in the denial of some meritorious claims. This argument is not

terribly compelling, given that the natural corollary to Petitioners' argument is that some innocent parties will also be dragged into court and subjected to the needless expense, inconvenience and embarrassment of defending patently meritless claims. Moreover, Petitioners' premise is faulty. Rule 8, as interpreted by these Courts, does not prejudice persons with meritorious claims. No court, and certainly not the Fifth Circuit, has held that a plaintiff must plead all evidentiary facts which support their claim. Rather, all that is required is that the plaintiff plead enough to establish that it has a colorable claim. It is not a great burden to place upon plaintiffs that they be able to state some real basis for believing that they have a legally cognizable injury for which the defendant may be liable.

**The holding of the Fifth Circuit does not violate the Rules Enabling Act.**

Petitioners' argument that the Fifth Circuit's holding violates the Rules Enabling Act is based upon their conclusion that some meritorious claims will be affected. Petitioners cite no evidence or authority in support of their assertion that some meritorious claims will be affected, but even were that true, their argument is specious. The Act provides that the Federal Rules shall



not "abridge, enlarge or modify any substantive right". Requiring the plaintiffs to show in their complaint that they have a claim does not abridge, enlarge or modify their substantive legal rights. Petitioners' substantive rights were that they were entitled to file a complaint and pursue a claim for relief, presuming that their civil rights had been violated and the other prerequisites of a claim met. Once that complaint is filed, however, rules of procedure govern how the complaint will be adjudicated.

If one were to adopt Petitioners' construction of the Rules Enabling Act, virtually every rule of procedure would be equally invalid. Several rules, including Rules 11, 41 or 56 could be used to defeat their claim. All of the other rules, when applied, will affect their claim. None of them diminish or modify their substantive rights, however, and Petitioners have not articulated any such modification.

Indeed, one might well argue that not only does the standard applied by the Fifth Circuit not violate the Rules Enabling Act, any other interpretation of Rule 8 would actually violate the Act. As previously stated, the absolute immunity that Lake Worth asserts affords the city not only immunity from liability, but also immunity

from suit, which can only be overcome if an unconstitutional municipal policy is involved. To force Lake Worth to litigate a claim before the existence of any municipal policy is shown by Petitioners abridges Lake Worth's substantive legal rights, specifically, immunity from suit. See e.g., *Elliott v. Perez*, 751 F.2d at 1479; *Morrison v. City of Baton Rouge*, 761 F.2d 242, 243-44 (5th Cir. 1985) (discussing impact of liberal Rule 8 interpretation on substantive qualified immunity law).


**Even if the Fifth Circuit erred in dismissing Petitioners' complaint, summary judgment for all defendants was still warranted.**

Even assuming for purposes of argument that the dismissal was inappropriate, the order of the District Court is equally sustainable based upon the alternative relief granted of summary judgment. Petitioners offered no evidence in response to the motion for summary judgment that the actions complained of were taken pursuant to any municipal policy or custom. Petitioners had ample time to discover and come forward with such evidence, as determined by the District Court. Hence, the Petitioners' complaint was properly dismissed in any event, and further review of the grounds for dismissal is not warranted.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



TIM G. SRALLA  
WAYNE K. OLSON \*

Members of the Firm of:  
FIELDING, BARRETT & TAYLOR  
8851 Highway 80 West, Suite 300  
Fort Worth, Texas 76116-6041  
(817) 560-0303  
Fax No. (817) 560-3953

ATTORNEYS FOR RESPONDENT  
CITY OF LAKE WORTH, TEXAS

\*Attorney of Record

MAY 27 1992

OFFICE OF THE CLERK

NO. 91-1657

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991**

---

Charlene LEATHERMAN, et al.,  
Petitioners  
V.

**TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION  
UNIT, et al.,  
Respondents**

---

**PETITIONERS' REPLY MEMORANDUM TO  
BRIEFS OF RESPONDENTS IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

DON GLADDEN  
Counsel of Record  
&  
RICHARD GLADDEN  
P.O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

MAY 22, 1992

NO. 91-1657

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991**

---

Charlene LEATHERMAN, et al.,  
Petitioners

V.

**TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION  
UNIT, et al.,  
Respondents**

---

**PETITIONERS' REPLY MEMORANDUM TO  
BRIEFS OF RESPONDENTS IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

DON GLADDEN  
Counsel of Record  
&  
RICHARD GLADDEN  
P.O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

MAY 22, 1992



PETITIONERS' REPLY TO RESPONDENTS'  
REASONS FOR DENIAL OF WRIT

A) Respondents' Suggestion of Mootness

Respondent City of Grapevine in its Brief in Opposition, at page 7, asserts that a judgment entered in the United States District Court for the Northern District of Texas on April 21, 1992, in favor of two police officers who were involved in only one of the two searches in question, "renders moot the allegations of municipal liability for failing to adequately train the officers." The judgment to which Respondent City of Grapevine refers, Andert v. Bewley, No. 4-91-68-A (N.D. Tex), (notice of appeal filed May 19, 1992) does not, for the reasons listed below, render moot the Questions Presented in the instant Petition for Writ of Certiorari:

1) The judgment in Andert v. Bewley considered and decided allegations solely against two police officers who participated in the second of the "two separate incidents," Pet. App. at page 3a, made the basis of Petitioners complaint in Leatherman v.

T.C.N.I.C.U., 755 F.Supp. 726 (N.D. Tex. 1991), aff'd., 954 F.2d 1054 (5th Cir. 1991), pet. for cert. pending, (U.S. No. 1657). Petitioners Charlene, Kenneth and Travis Leatherman are not parties to the action in Andert v. Bewley, supra, and their claims underlying the present Petition for Certiorari were not considered or decided in any respect by the judgment entered April 21, 1992 in Andert v. Bewley;

2) Moreover, the judgment entered in Andert v. Bewley, supra, did not reach the merits of the constitutional claims of Petitioners Gerald Andert, Donald Andert, and Kevin, Jerri, Travor, Shane and Pat Lealos. The April 21, 1992, judgment in Andert v. Bewley rests on a directed verdict in favor of Defendant Traweck based on the District Court's assumption that "[n]o liability was sought by the complaint to be imposed on . . . Traweck for the conduct of other persons involved involved in the execution of the search warrant," id at page 5; and as to Defendant Bewley, a jury verdict based on qualified immunity finding that Defendant

Bewley's alleged unprovoked clubbing of Petitioner Gerald Andert was not "clearly excessive," "grossly disproportionate to the need for action," "inspired by malice" or "an abuse of official power that shocks the conscious."

Unlike the situation which the Supreme Court confronted in City of Los Angeles v. Heller, 475 U.S. 796 (1986), wherein claims against a municipality were rendered moot by a jury verdict finding no constitutional violation by the individual officers involved, the judgment in favor of the individual officers in Andert v. Bewley did not reach the question of whether either officer, or indeed any of the estimated 14 other police officers executing the search warrant at the Andert/Lealos residence, inflicted or caused Petitioners to "suffe[r] a constitutional injury at the hands of the individual police officer[s]." City of Los Angeles v. Heller, 475 U.S. at 799.

The claims underlying the instant petition for Writ of Certiorari are not moot, and the Petition

should be granted to decide the Questions Presented therein.

#### CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the February 28, 1992 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

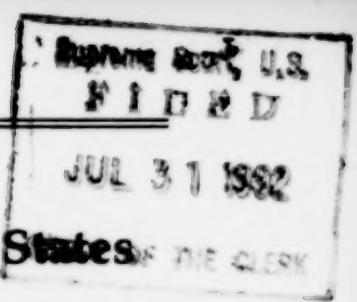


DON GLADDEN  
Counsel of Record

&

RICHARD GLADDEN  
P.O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

ATTORNEYS FOR  
PETITIONERS



In The  
**Supreme Court of the United States**  
October Term, 1992

CHARLENE LEATHERMAN, ET AL.,

vs. *Petitioners,*

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, ET AL.,

*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals For The Fifth Circuit

**JOINT APPENDIX**

DON GLADDEN\* &  
RICHARD GLADDEN  
P. O. Box 50686  
Fort Worth, Texas 76105  
(817) 531-3667  
*Counsel for Petitioners*

KEVIN J. KEITH\*  
DAVID L. BENFORD  
FOWLER, WILES, NORTON,  
& KEITH, L.L.P.  
1900 Cityplace Center  
2711 North Haskell  
Dallas, Texas 75204  
(214) 841-3000  
*Counsel for Respondent  
City of Grapevine, Texas*

\*Counsel of Record

VAN THOMPSON, Jr.\*  
Assistant District Attorney  
Tarrant County, Texas  
401 West Belknap  
Fort Worth, Texas  
76196-0401

(817) 884-1233  
*Counsel for Respondents  
T.C.N.I.C.U., Tarrant  
County, Texas, Don  
Carpenter, and Tim Curry*

TIM G. SRALLA  
WAYNE K. OLSON\*  
FIELDING, BARRETT & TAYLOR  
8851 Highway 80 West  
Suite 300  
Fort Worth, Texas  
76116-6041  
(817) 560-0303  
*Counsel for Respondent  
City of Lake Worth, Texas*

Petition For Certiorari Filed April 16, 1992  
Certiorari Granted June 22, 1992



## TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES .....	1
PLAINTIFF'S ORIGINAL PETITION .....	3
DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT.....	9
ORDER GRANTING MOTION TO DISMISS.....	19
PLAINTIFFS' MOTION TO VACATE ORDER OF DIS- MISSAL AND FOR DEFERRAL OF CONSIDER- ATION AND DECISION ON DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDG- MENT AND BRIEF IN SUPPORT THEREOF .....	21
ORDER VACATING DISMISSAL .....	26
PLAINTIFF'S FIRST AMENDED COMPLAINT .....	28
DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT.....	53
DEFENDANTS' MOTION FOR PROTECTIVE ORDER .....	133
DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER.....	149
ORDER GRANTING MOTION FOR PROTECTIVE ORDER .....	159
FINAL JUDGMENT OF DISMISSAL .....	161

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:



## TABLE OF CONTENTS - Continued

	Page
Opinion of the United States Court of Appeals for the Fifth Circuit in <i>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, et al.</i> , dated February 28, 1992, now found at 954 F.2d 1054 (1992).....	1a
Opinion of the Honorable John McBryde in <i>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, et al.</i> , dated January 22, 1991, now found at 755 F.Supp. 726 (1992) .....	25a

## RELEVANT DOCKET ENTRIES

December 12, 1989	Defendants' Petition for Removal filed
December 20, 1989	Defendants' Motion to Dismiss or for Summary Judgment filed
February 1, 1990	Order granting Defendants' Motion to Dismiss is filed
February 8, 1990	Plaintiffs' Motion to Vacate Order of Dismissal filed
March 1, 1990	Defendants' Response to Plaintiffs' Motion to Vacate is filed
March 8, 1990	Order to Vacate Order of Dismissal is filed and Plaintiffs have 20 days to amend complaint
March 23, 1990	Amended Complaint is filed
April 16, 1990	Answer of City of Lakeworth is filed
April 17, 1990	Answer of City of Grapevine is filed; Motion to Dismiss or for Summary Judgment of Tarrant County is filed
June 7, 1990	Defendants' Motion for Protective Order is filed
June 18, 1990	Plaintiffs' Response to Defendants' Motion for Protective Order is filed
July 23, 1990	Plaintiffs' Reply to Defendants' Motion to Dismiss or for Summary Judgment is filed
July 25, 1990	Plaintiffs' Supplemental Response to Defendants' Motion to Dismiss or for Summary Judgment is filed

August 9, 1990 Cause is transferred to Judge  
McBryde by Special Order No. 3-64

December 31, 1990 Order granting Defendants' Motion  
for Protective Order filed

January 22, 1991 Memorandum Opinion and Order  
dismissing all claims of Plaintiffs is  
filed

January 22, 1991 Final Judgment in favor of Defen-  
dants is entered

February 20, 1991 Notice of Appeal is given

February 22, 1992 Opinion of the Fifth Circuit Court  
of Appeals is filed

March 24, 1992 Judgment as Mandate is issued to  
the Clerk

---

CAUSE NO. 96-124444-89

CHARLENE LEATHERMAN \* IN THE DISTRICT  
AND KENNETH \* COURT  
LEATHERMAN as Individuals,\*  
and next friends of TRAVIS \*  
LEATHERMAN, \*  
Plaintiffs \*  
VS. \* TARRANT COUNTY,  
\* TEXAS  
THE TARRANT COUNTY \*  
NARCOTICS INTELLIGENCE \*  
AND COORDINATION UNIT \*  
and TARRANT COUNTY, \*  
TEXAS \* 96 JUDICIAL  
Defendants \* DISTRICT

PLAINTIFF'S ORIGINAL PETITION  
(Filed Nov. 22, 1989)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW CHARLENE LEATHERMAN AND  
KEN LEATHERMAN, as Individuals and as next friends  
of TRAVIS LEATHERMAN, complaining of the TAR-  
RANT COUNTY NARCOTICS INTELLIGENCE AND  
COORDINATION UNIT and TARRANT COUNTY,  
TEXAS, Defendants. For cause of action, Plaintiffs  
respectfully show the Court as follows:

I.

Plaintiffs are individuals residing in Tarrant County,  
Texas.

Defendant TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION UNIT is a law

enforcement agency believed to be administered and supervised by the Tarrant County District Attorney's Office. Defendant TARRANT COUNTY, TEXAS is a Texas County. Both Defendants may be served with process herein by serving ROY ENGLISH, the County Judge of Tarrant County, Texas at 100 East Weatherford, Fort Worth, Texas 76196 during normal business hours.

## II.

This is a suit for damages brought under Article 42 of the United States Code, Section 1983; the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; Article One, Sections Nine, Thirteen, Fifteen, Seventeen and Nineteen of the Texas Constitution; and the common law of the State of Texas.

Venue is proper in the District Courts of Tarrant County, Texas in that the incident made basis of this suit occurred in Tarrant County, Texas; all Defendants herein reside in Tarrant County, Texas; and all Plaintiffs reside in Tarrant County, Texas.

## III.

On or about May 20, 1989, Plaintiff CHARLENE LEATHERMAN and her son, TRAVIS LEATHERMAN were stopped in the 8200 block of Cahoba Road in Fort Worth, Tarrant County, Texas by law enforcement officers in a marked police car. Immediately after Plaintiff CHARLENE LEATHERMAN brought her vehicle to a stop, she was surrounded by several men, later discovered to be plain clothes police officers, who were armed with hand

guns and other weapons. The plain clothes police officers shouted a variety of instructions to Plaintiff CHARLENE LEATHERMAN and her son, TRAVIS LEATHERMAN and threatened to shoot both CHARLENE LEATHERMAN and TRAVIS LEATHERMAN to death. The plain clothes police officers proceeded to identify Plaintiff CHARLENE LEATHERMAN and her son, TRAVIS LEATHERMAN, detained and arrested them, and ordered both CHARLENE LEATHERMAN and TRAVIS LEATHERMAN to accompany the officers to the Leatherman residence located at 8204 Cohoba Road, Fort Worth, Texas. Upon arrival at the residence in question, Plaintiff CHARLENE LEATHERMAN and TRAVIS LEATHERMAN were informed that the law enforcement officers involved in the incident had shot to death both dogs belonging to the Leathermans and were in the process of conducting a search of the Leatherman's residence. At that time, Plaintiff CHARLENE LEATHERMAN was provided with a copy of a search warrant and an affidavit for a search warrant purportedly authorizing the officers to search the Leatherman's residence for amphetamines, methamphetamines, or other controlled substances. Upon the conclusion of the search of the Leatherman residence, the law enforcement officers involved returned to their vehicles that were parked in the Leatherman's residence driveway, removed their bullet proof vests and began smoking, talking and drinking beer. The officer who was apparently in charge of the situation told Plaintiff CHARLENE LEATHERMAN that he was "sorry about the mistake" and shortly thereafter the law enforcement officers involved in the incident left the Leatherman residence.



## IV.

Plaintiffs have reason to believe and do believe that at all times relevant hereto the law enforcement officers involved in the incident made basis of this suit were acting under the color of Texas State law and were acting in accordance with official policy usage and custom of the TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT of the Tarrant County District Attorney's Office and were therefore in the course and scope of their duties as agents, servants, and/or employees of TARRANT COUNTY, TEXAS.

## V.

At the time of the incident made basis of this suit, Plaintiffs CHARLENE LEATHERMAN AND KENNETH LEATHERMAN had committed no offense or taken any action that would justify the outrageous detention and arrest of Plaintiff CHARLENE LEATHERMAN or the brutal, destructive, and unreasonable invasion and search of the residence occupied by Plaintiffs CHARLENE LEATHERMAN AND KENNETH LEATHERMAN.

## VI.

The detention and arrest of Plaintiffs CHARLENE LEATHERMAN and her son, TRAVIS LEATHERMAN and the invasion and search of the residence occupied by Plaintiffs CHARLENE LEATHERMAN AND KENNETH LEATHERMAN were done without probable cause and in violation of the rights guaranteed to Plaintiffs and each of

them under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution; Article One, Sections Nine, Thirteen, Fifteen, Seventeen, and Nineteen of the Texas Constitution; Article 42 of the United States Code, Section; and the common law of the State of Texas.

## VII.

As a direct and proximate result of the actions of the law enforcement officers as described above, Plaintiffs and each of them have suffered property damage, embarrassment, humiliation, anxiety, and mental distress, and will in all likelihood, continue to so suffer far into the future, if not for the remainder of their lives. Plaintiffs suffering in the past and that suffering reasonably anticipated in the future has damaged and will damage Plaintiffs in an amount exceeding the minimum jurisdictional limits of this Court for which Plaintiffs now sue.

## VIII.

The conduct of the law enforcement officers, acting in the course and scope of their employment, assignment, and/or agency with the TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT of the Tarrant County District Attorney's Office and of TARRANT COUNTY as described above was willful, intentional, malicious, and outrageous. The law enforcement officers involved in this incident acted with reckless and heedless disregard for the rights and to the sensitivities of Plaintiffs and each of them to such an extent that an award of exemplary damages in the amount of not less than FIVE HUNDRED THOUSAND DOLLARS



AND NO/100 (\$500,000.00) against Defendants and in favor of Plaintiffs is justified herein at law and in fact.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein and that on final trial the Court order that Plaintiffs have judgment over and against Defendants for their actual damages in an amount exceeding the jurisdictional limits of this Court; for exemplary damages in an amount of not less than \$500,000.00; for the costs of this suit; and for such other and further relief, both special and general, at law or in equity, to which Plaintiffs may show themselves to be entitled.

Respectfully Submitted,  
 WILLIAM W. HARRIS  
 State Bar No. 09097100  
 1901 Central Drive, #208  
 Bedford, Texas 76021  
 (817) 283-4476  
 ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF TEXAS  
 FORT WORTH DIVISION

CHARLENE LEATHERMAN	§	CIVIL ACTION
AND KENNETH LEATHERMAN	§	NO.
as Individuals, and next friends	§	CA4-89-842-K
of TRAVIS LEATHERMAN,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	
	§	
THE TARRANT COUNTY	§	
NARCOTICS INTELLIGENCE	§	
AND COORDINATION UNIT and	§	
TARRANT COUNTY, TEXAS	§	
	§	
Defendants	§	

**MOTION TO DISMISS**  
**OR FOR SUMMARY JUDGMENT**

(Filed Dec. 20, 1989)

TO THE HONORABLE DAVID O. BELEW, JR., JUDGE:

The Tarrant County Narcotics Intelligence and Coordination Unit and Tarrant County, Texas, Defendants in the above numbered and entitled cause, respectfully submit herewith pursuant to Rules 12(b)(6) and Rule 56, FED. R. CIV. PROC., their Motion to Dismiss or for Summary Judgment and show:

I.

The Complaint fails to state any claim upon which relief may be granted because:

1. The Tarrant County Narcotics Intelligence and Coordination Unit is not a legal entity capable of being sued and cannot be a "person" within the meaning of § 1983.

2. The Complaint fails to allege any policy, practice or usage of Tarrant County which "caused" the alleged deprivation of Plaintiff's rights.

3. The allegations of the Complaint are too broad and conclusory to state any claim under 42 U.S.C. § 1983.

## II.

There is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law because:

1. The Complaint fails to state any claim upon which relief may be granted.

2. Tarrant County cannot be held liable under the doctrine of respondeat superior or any other theory of vicarious liability;

3. The summary judgment evidence shows that:

(a) The officers' search of Plaintiffs' premises was authorized by a valid search and arrest warrant.

(b) The destruction of the dogs was reasonable and necessary to protect the officers and effectuate the search of Plaintiffs' premises as ordered by the warrant.

(c) The search warrant authorized the N.I.C.U. officers to require Charlene Leatherman to return to the premises and to remain there while the search was being conducted.

4. There is no recognized state constitutional tort under Texas law.

5. Plaintiffs' have not alleged any action or omission which would fall within any exception to these Defendants' immunity from suit as provided in the Texas Tort Claims Act, Chapter 101, Texas Civil Practice and Remedies Code.

6. Tarrant County is not liable under either § 1983 or state law for punitive damages.

## III.

This Motion is supported by the pleading and the affidavits and attachments thereto submitted with this Motion.

WHEREFORE, premises considered, Defendants pray that the Court dismiss Plaintiffs' complaint for failure to state a claim upon which relief may be granted, or in the alternative, for summary judgment.

Respectfully submitted,

TIM CURRY  
CRIMINAL DISTRICT ATTORNEY  
TARRANT COUNTY, TEXAS

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.  
Assistant District Attorney  
State Bar No. 19960000  
200 West Belknap  
Fort Worth, TX 76196-0201  
(817) 334-1233

/s/ Barrie Howard  
 BARRIE HOWARD  
 Assistant District Attorney  
 State Bar No. 10061720  
 200 West Belknap  
 Fort Worth, TX 76196-0201  
 (817) 334-1233

ATTORNEYS FOR DEFENDANTS  
 TARRANT COUNTY, TEXAS, AND  
 TARRANT COUNTY NARCOTICS  
 INTELLIGENCE AND  
 COORDINATION UNIT

#### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was this day served upon the Plaintiffs by and through their attorney of record, WILLIAM W. HARRIS, 1901 Central Drive, #208, Bedford, Tarrant County, Texas 76021, in accordance with the provisions of Rule 5, FED. R. CIV. PROC.

Dated this 20th day of December, 1989.

/s/ Barrie Howard  
 BARRIE HOWARD

#### EXHIBIT A

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

CHARLENE LEATHERMAN	§	CIVIL ACTION
AND KENNETH LEATHERMAN	§	NO.
as Individuals, and next friends	§	CA4-89-842-K
of TRAVIS LEATHERMAN,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	
	§	
THE TARRANT COUNTY	§	
NARCOTICS	§	
COORDINATION AND	§	
INTELLIGENCE UNIT and	§	
TARRANT COUNTY, TEXAS	§	
	§	
Defendants	§	

#### AFFIDAVIT OF TIM CURRY

THE STATE OF TEXAS §  
 §  
 COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared TIM CURRY, who by me having been duly sworn made the following affidavit:

My name is Tim Curry. I am above the age of 21 years, fully competent to make this affidavit, and have personal knowledge of the matters of material fact hereinafter set forth, which are true and correct.

At all times relevant and material to this cause I have been the Criminal District Attorney of Tarrant County, Texas.

The Tarrant County Narcotics Intelligence and Coordination Unit (N.I.C.U.) is a "Project" to provide a multi-jurisdictional drug task force with a centralized coordination unit. It was formed in 1988 and is funded primarily through grants received from the federal government through the Governor's Office of the State of Texas, Criminal Justice Division, to Tarrant County. I am Chairman of the Board of Directors and Project Director. The N.I.C.U. is not a separate governmental entity from Tarrant County.

Attached hereto as Attachment 1 is a true copy of the Form 424 for the current year concerning the application for the grant.

Attachment 1 is a business record kept in the regular course of business in the Office of the Criminal District Attorney. It was prepared at or near the time of the fact or event recorded by persons having actual knowledge, and it is the regular course of business to keep such records. I am the custodian of the records of the Office of the Criminal District Attorney of Tarrant County, Texas, and they are kept under my supervision and control.

It is not the policy of the N.I.C.U. to arrest without probable cause, to conduct warrantless searches and seizures without probable cause, or to violate the civil liberties of the citizens within its jurisdiction. It is the policy to obtain search warrants from a duly authorized magistrate prior to conducting a search of property.

Only reasonable force may be used where necessary by the N.I.C.U. officers in executing any search warrant so obtained.

Further, affiant sayeth not.

/s/ Tim Curry  
TIM CURRY

THE STATE OF TEXAS     §  
                                     §  
COUNTY OF TARRANT   §

SWORN to and subscribed before me by the said Tim Curry on this the 19th day of December, 1989.

[SEAL] ANGELA DAWN PHILLIPS  
NOTARY PUBLIC  
THE STATE OF TEXAS  
COMMISSION EXPIRES  
9-22-90

/s/ Angela Dawn Phillips  
Notary Public in and for  
the State of Texas

Angela Dawn Phillips  
Notary's Printed Name

My commission expires:  
9/22/90



**EXHIBIT B**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF TEXAS**  
**FORT WORTH DIVISION**

CHARLENE LEATHERMAN	§	CIVIL ACTION
AND KENNETH LEATHERMAN	§	NO.
as Individuals, and next friends	§	CA4-89-842-K
of TRAVIS LEATHERMAN,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	
	§	
THE TARRANT COUNTY	§	
NARCOTICS INTELLIGENCE	§	
AND COORDINATION UNIT	§	
and TARRANT COUNTY, TEXAS	§	
	§	
Defendants	§	

**AFFIDAVIT OF MIKE ADAIR**

THE STATE OF TEXAS   §  
                                   §  
 COUNTY OF TARRANT   §

BEFORE ME, the undersigned authority, on this day personally appeared MIKE ADAIR, who by me having been duly sworn made the following affidavit:

My name is Mike Adair. I am above the age of 21 years, fully competent to make this affidavit, and have personal knowledge of the matters of material fact hereinafter set forth, which are true and correct.

At all times relevant and material to this cause I have been the Assistant Director of the

Tarrant County Narcotics Intelligence and Coordination Unit (N.I.C.U.).

Attached hereto as Attachments 1 and 2 are true copies of the Search and Arrest Warrant and Affidavit, dated May 20, 1989, concerning the premises at 8204 Cohoba Street in the City of Fort Worth, Texas.

Attached hereto as Attachments 3 and 4 are true copies of Offense Report 89TF70 and Supplemental Report 89TF70 concerning the execution of the Search and Arrest Warrant, dated May 20, 1989, of the premises at 8204 Cohoba Street in the City of Fort Worth, Texas.

Also attached hereto as Attachment 5 is a true copy of Tactical Operations Report No. 98-T-005, dated May 20, 1989, of the Lake Worth Police Department. This report was made by a law enforcement officer in the regular course of his duties to report matters which he is required by law to observe and report.

Attachments 1 through 5 are records kept or received in the regular course of business by N.I.C.U. It is the regular course of business to keep and receive such records. They are kept and received by persons having actual knowledge thereof at or near the time of the fact or event recorded.

At the time of the execution of the warrant described above the officers advise that they encountered two large dogs, a doberman and a German shepherd, on the premises. There was no one present to control them. These dogs were threatening to attack the officers and it was necessary for the officers to destroy them for the protection of the officers.

Except for the shooting of the dogs, no guns were drawn and no threats were made against Charlene Leatherman or her son. It was not necessary to break in the door in order to gain entry to the residence on the property, and no property damage was done to the property or possessions of the occupants by the officers, except for the shooting of the dogs.

Further, affiant sayeth not.

/s/ Mike Adair  
MIKE ADAIR

THE STATE OF TEXAS §  
§  
COUNTY OF TARRANT §

SWORN to and subscribed before me by the said Mike Adair on this the 19th day of December, 1989.

[SEAL] ANGELA DAWN PHILLIPS  
NOTARY PUBLIC  
THE STATE OF TEXAS  
COMMISSION EXPIRES  
9-22-90

/s/ Angela Dawn Phillips  
Notary Public in and for  
the State of Texas

Angela Dawn Phillips  
Notary's Printed Name

My commission expires:  
9/22/90

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN	§	
AND KENNETH	§	CIVIL ACTION
LEATHERMAN as next friends	§	NO. 4-89-842-K
of TRAVIS LEATHERMAN	§	
VS.	§	
	§	
THE TARRANT COUNTY	§	
NARCOTICS COORDINATION	§	
AND INTELLIGENCE UNIT	§	
and TARRANT COUNTY, TEXAS	§	

ORDER

(Filed Feb. 1, 1990)

Pending before the Court is the Defendants' Motion to Dismiss pursuant to federal rule of civil procedure 12(b)(6), to which the Plaintiffs have failed to respond. After careful review of the pleadings, the brief and the applicable law, it is the opinion of this Court that the Plaintiffs' Complaint fails to allege any custom practice or usage from which a policy may be inferred, which would violate any constitutional right of the Plaintiffs in this cause. Consequently the Court is of the opinion that the Defendants' Motion is well taken and should be granted.

Therefore, the Defendants' Motion to Dismiss is hereby GRANTED and the above styled and numbered cause of action is hereby DISMISSED.

IT IS SO ORDERED.

SIGNED this 1 day of February, 1990.

/s/ David O. Belew, Jr.  
 DAVID O. BELEW, JR.  
 UNITED STATES DISTRICT  
 JUDGE

---

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF TEXAS  
 FORT WORTH DIVISION

CHARLENE LEATHERMAN	)	
AND KENNETH	)	CIVIL ACTION
LEATHERMAN as next friends	)	NO. 4-89-842K
of TRAVIS LEATHERMAN	)	
VS.	)	
	)	
THE TARRANT COUNTY	)	
NARCOTICS INTELLIGENCE	)	
AND COORDINATION UNIT	)	
and TARRANT COUNTY, TEXAS	)	

PLAINTIFFS' MOTION TO VACATE ORDER OF DIS-  
 MISSAL AND FOR DEFERRAL OF CONSIDERATION  
 AND DECISION ON DEFENDANTS' MOTION TO DIS-  
 MISS OR FOR SUMMARY JUDGMENT AND BRIEF IN  
 SUPPORT THEREOF

NOW COME Plaintiffs Charlene Leatherman and  
 Kenneth Leatherman, as individuals, and as next friends  
 of Travis Leatherman, and files this their Motion to  
 Vacate Order of Dismissal and for Deferral of Consider-  
 ation and Decision on Defendants' Motion to Dismiss or  
 for Summary Judgment, and in support thereof would  
 respectfully show the Court the following:

1.

On or about November 22, 1989 the Plaintiff, through  
 their counsel William W. Harris, filed their Original Peti-  
 tion against the Defendants in the 96th Judicial District  
 Court of Tarrant County, Texas, stating cause of actions  
 inter alia, that their rights to be free from unreasonable



search and seizure protected by the Fourth Amendment to the United States Constitution were violated as a result of the Defendants' execution of a search warrant wherein Plaintiffs' home was ransacked and their two family dogs deliberately shot to death by Defendants' agents without provocation or reasonable justification.

## 2.

On or about December 12, 1989 Defendants Tarrant County Narcotics Intelligence and Coordination Unit ("T.C.N.I.C.U.") and Tarrant County, Texas ("Tarrant County"), removed Plaintiffs' cause of action to this Honorable Court. Plaintiffs' attorney in the state court proceedings, William W. Harris, having not received admission to practice in federal court, immediately began making inquiries with other counsel in the Fort Worth area in an effort to obtain co-counsel to assist in prosecuting Plaintiffs' case.

Contact was made with the undersigned and he agreed to assume co-counsel status of Plaintiffs' case, conditioned upon Mr. Harris receiving express consent from the Plaintiffs. Although Mr. Harris anticipated being able to promptly confer with his clients to receive the agreed upon consent, because Plaintiffs do not maintain residential phone service, it was several days before express consent was received from Plaintiffs (via the United States Postal Service) to employ Mr. Gladden as counsel. That consent was given on February 6, 1990, the date of the order of dismissal.

## 3.

After conducting an initial investigation into the applicable law and the facts and circumstances alleged by Plaintiffs and other facts made known to the undersigned, he has concluded that the facts and law support a valid claim against Defendants' employees and most likely against Defendant Governmental entities, see e.g., *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1297-1298 (7th Cir. 1989), (holding unjustified shooting of family dog states claim against individual officer and governmental entity).

## 4.

The dismissal of Plaintiffs' case based on Rule 12(b)(6) of the Federal Rules of Civil Procedure is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1186 (5th Cir. 1986). In Plaintiffs' Original Petition filed in state court, the Plaintiffs alleged that liability against Defendants T.C.N.I.C.U. and Tarrant County, Texas, would be established by proof that the officers who violated Plaintiffs' constitutional rights "were acting in accordance with official policy, usage and custom" of these Defendants (Plaintiffs' Original Petition, paragraph IV). While the foregoing statement arguably does not sufficiently articulate the "failure to train" theory of policy under 42 U.S.C Section 1983, as that theory was applied to facts almost identical to those of the instant case in *Erwin v. County of Manitowoc*, supra, 872 F.2d at 1297, the undersigned counsel submits that



"the policy of the federal rules favoring adjudication on the merits," *Partidge*, supra, 791 F.2d at 1189 n.3, warrants the granting of Plaintiffs' request that the Court's Order of Dismissal be vacated, and a final decision on Defendants' Motion for Dismissal and for Summary Judgment be deferred for 20 days, so that the undersigned counsel may adequately respond to the arguments raised by Defendants and that Plaintiffs may amend their pleadings to conform with the technical pleading requirements under 42 U.S.C. Section 1983.

Respectfully submitted,

LAW OFFICES OF DON GLADDEN  
P. O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

By: /s/ Don Gladden  
DON GLADDEN

ATTORNEY FOR PLAINTIFFS

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument has been served on the attorneys for all parties on this the 8th day of February, 1990, in accordance with the Federal Rules of Civil Procedure.

/s/ Don Gladden  
DON GLADDEN

#### CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he has conferred with the attorney for Defendants, Assistant District Attorney Van Thompson on the 8th day of February, 1990, who advises that he opposes this motion.

/s/ Don Gladden  
DON GLADDEN

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN	§	
AND KENNETH	§	
LEATHERMAN as Individuals	§	CIVIL ACTION
and next friends	§	NO. 4-89-842-K
of TRAVIS LEATHERMAN	§	
VS.	§	
THE TARRANT COUNTY	§	
NARCOTICS INTELLIGENCE	§	
AND COORDINATION UNIT	§	
and TARRANT COUNTY, TEXAS	§	

ORDER

(Filed Mar. 8, 1990)

Pending before the Court is the Plaintiffs' Motion to Vacate the Order of Dismissal entered by this Court on 1 February, 1990. After careful review of the respective briefs and the applicable law, it is the opinion of this Court that the Plaintiffs' Motion is well taken and should be granted.

Therefore, the Order of Dismissal entered in the above styled and numbered cause on 1 February 1990 is hereby VACATED.

Further, the Plaintiffs are hereby ORDERED to amend their Complaint within 20 days from the signing of this Order.

IT IS SO ORDERED.

SIGNED this 8 day of March, 1990.

/s/ David O. Belew, Jr.  
DAVID O. BELEW, JR.  
UNITED STATES DISTRICT  
JUDGE

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN and )  
KENNETH LEATHERMAN, )  
Individually and as Next Friends )  
of TRAVIS LEATHERMAN; )  
GERALD ANDERT; KEVIN )  
LEALOS and JERRI LEALOS, )  
Individually and as Next Friends )  
of SHANE LEALOS and )  
TRAVOR LEALOS; PAT LEALOS; )  
DONALD ANDERT; and LUCY )  
ANDERT, )  
Plaintiffs )

VS. )

) No. CA-4-89-842-K

THE TARRANT COUNTY )  
NARCOTICS INTELLIGENCE )  
AND COORDINATION UNIT; )  
TIM CURRY, in his Official )  
Capacity as Director of the )  
Tarrant County Narcotics )  
Intelligence and )  
Coordination Unit; TARRANT )  
COUNTY, TEXAS; DON )  
CARPENTER, in his Official )  
Capacity as Sheriff of Tarrant )  
County, Texas; CITY OF LAKE )  
WORTH, TEXAS; and CITY OF )  
GRAPEVINE, TEXAS, )  
Defendants )

PLAINTIFF'S FIRST AMENDED COMPLAINT  
(Filed Mar. 23, 1990)

In accordance with the Order of the Court of March 8, 1990, requiring Plaintiffs to amend, Plaintiffs herewith file their First Amended Complaint.

Plaintiffs bring this action pursuant to 42 U.S.C. Section 1983 and 1988, alleging the violation of their rights guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution. In addition to damages sought for the deprivation of their federally protected Constitutional rights, Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202.

1.

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1343.

PARTIES

2.

Plaintiffs Kenneth Leatherman and Charlene Leatherman, individually and in their capacities as Next of Friends to Travis Leatherman, a minor, are and were at the time of the acts complained of herein, citizens of the United States and residents of the city of Fort Worth, Texas.

3.

Plaintiff Gerald Andert is and was at the time of the acts complained of herein, a citizen of the United States and a resident of the city of Southlake, Texas.

4.

Plaintiffs Kevin and Jerri Lealos, individually and in their capacities as Next of Friends to Shane and Travor Lealos, minors are and were at the time of the acts complained of herein, citizens of the United States and residents of the city of Southlake, Texas.

5.

Plaintiff Pat Lealos is and was at the time of the acts complained of herein, a citizen of the United States and a resident of El Paso, Texas.

6.

Plaintiff Donald Andert is and was at the time of the acts complained of herein, a citizen of the United States and a resident of Shakopee, Minnesota.

7.

Plaintiff Lucy Andert is and was at the time of the acts complained of herein, a citizen of the United States and a resident of Hancock, Minnesota.

8.

Defendant Tim Curry is and was at the time of the acts complained of herein the Director of Defendant Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"). As Director of TCNICU, Defendant Curry was vested with official authority and responsibility for establishing policies for and supervising the day-to-day operations and practices of law enforcement personnel participating in and comprising the Defendant Tarrant County Narcotics Intelligence and Coordination Unit.

Defendant Tim Curry may be served with process at his place of employment at the Tarrant County District Attorney's Office located at 200 West Belknap Street, Fort Worth, Texas.

9.

Defendant Don Carpenter was, at the time this action arose, the duly elected, qualified and acting Sheriff for Defendant Tarrant County, Texas ("Tarrant County"). As Sheriff for Defendant Tarrant County, Defendant Carpenter was vested with official authority and responsibility for establishing policies for and supervising the day-to-day operations and practices of law enforcement personnel employed by Defendant Tarrant County.

Defendant Don Carpenter may be served with process at his place of employment at the Tarrant County Sheriff's Office located at 300 West Belknap Street, Fort Worth, Texas.



10.

Defendant City of Lake Worth is a municipal corporation incorporated under the laws of the State of Texas and situated in Tarrant County, Texas, and may be served with process by serving the City Secretary of said City at 6720 Telephone Road, Lake Worth, Texas 76135.

11.

Defendant City of Grapevine is a municipal corporation incorporated under the laws of the State of Texas and is situated in Tarrant County, Texas, and may be served with process by serving the City Secretary of said City at 413 Main Street, Grapevine, Texas.

### FACTS

12.

At approximately 8 o'clock p.m. on January 30, 1989, Gerald Andert and his family were gathered at Gerald's home located in the 2000 block of Kimball Road in the City of Southlake, Texas, mourning the tragic death of Marie Andert, Gerald's wife and the matriarch of the Andert family, who had died two days earlier after a three year battle with cancer. Present at the residence were Kevin and Jerri Lealos (Gerald's son-in-law and daughter, respectively, who also lived at the resident, hereinafter referred to as the "Lealos" residence); Shane and Tavor Lealos (respectively the daughter and son of Kevin and Jerri Lealos); Pat Lealos (Kevin's sister who had flown in from El Paso, Texas, for the funeral); Donald

Andert (Gerald Andert's son); and Lucy Andert (Gerald's 76 year old sister-in-law).

13.

Moments after 8 o'clock on the evening in question, and completely without prior warning, numerous law enforcement officers of the Defendant City of Grapevine and Defendant TCNICU broke into the Lealos home. Upon hearing the French doors of the house breaking open, Gerald Andert, who at the time was seated in the kitchen area of his home looking at photographs of his late wife, turned to determine what was going on. As Gerald turned around, an unidentified officer knocked him backwards, breaking the back of the wooden chair in which he was sitting. Upon turning back toward the officer and raising his arms to deflect another blow, Gerald was without provocation clubbed twice on the head by the officer, causing a severe cut to Gerald's forehead which would later require 11 stitches to close.

14.

During the extended period of time during which Gerald Andert and members of the Lealos family were required to lie face down on the floor, held at gunpoint, fearing for their lives and still unaware of the identify of these armed intruders, several requests for identification were made of the law enforcement officers present. The officers responded to these requests for identification by shouting obscenities and threats at the persons requesting such information.

15.

Upon the conclusion of their search of the Lealos residence some 1 1/2 hours later, and having discovered no items which could form the basis of a criminal prosecution, the officers left the premises without so much as an apology for their wrongful search of the Lealos residence, or the grossly abusive manner in which the search was carried out.

16.

On or about May 20, 1989, Plaintiff Charlene Leatherman and her son, Travis Leatherman were stopped in the 8200 block of Cahoba Road in Fort Worth, Tarrant County, Texas, by law enforcement officers in a marked police car. Immediately after Charlene brought her vehicle to a stop, she was surrounded by several men, later discovered to be plain clothes police officers, who were armed with hand guns and other weapons. The plain clothes police officers shouted a variety of instructions to Charlene and Travis and threatened to shoot each of them. The plain clothes police officers proceeded to identify Charlene and Travis, and moments later informed them that law enforcement officers executing a warrant had shot to death two dogs belonging to the Leathermans and were in the process of conducting a search of the Leatherman's residence. When Charlene inquired of the officer apparently in charge of the search as to why the family dogs had been shot, the officer replied that this was "standard procedure."

17.

The search of the Leathermans' home was planned and carried out by law enforcement officers employed by or under the control of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth.

18.

Upon the conclusion of the search of the Leatherman residence, and having discovered no items described in the warrant which could otherwise have provided a basis for a criminal prosecution, the officers verbally acknowledged to Charlene and Travis their "mistake" in having searched the Leatherman residence. Instead of leaving at this time however, the officers removed lawn chairs from a truck in which they had arrived and proceeded to lounge about the driveway and yard of the Leatherman residence for approximately 1 1/2 hours, drinking beer, smoking, talking, laughing, and essentially having a party to celebrate their seemingly unbridled governmental power.

19.

On returning to their residence, Charlene and Travis Leatherman discovered "Shakespeare," the smaller of the two family dogs owned by the Leathermans, lying shot to death approximately 25 feet from the main doorway entrance to their home. Shakespeare appeared to have been shot three times: once in the stomach, once in the leg, and once in the head. Upon entering the doorway of the residence, it appeared that "Ninja," the larger of the

two dogs owned by the Leathermans, had defecated just inside the door of the residence. Ninja was subsequently discovered on top of a bed located in a rear bedroom of the house. Ninja had been shot in the head at close range, apparently with a shotgun, which resulted in brain matter being splattered across the bed, against the wall, and on the floor around the bed.

20.

As a result of the extreme emotional shock and distress experienced by Charlene, Travis and Kenneth Leatherman resulting from the unreasonable search of their home and the malicious shooting of their family pets, the Leatherman family found it necessary to locate and temporarily secure other lodging.

#### COUNT I

21.

Plaintiffs Charlene and Kenneth Leatherman (hereinafter sometimes referred to as "the Leathermans") allege that the shooting of their family dogs on the occasion in question by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their effects against unreasonable seizure as protected by the Fourth Amendment to the United States Constitution. Plaintiffs would show in this connection that at the time of the shootings of their dogs there existed no reasonable justification for the shooting of their dogs, and that the officers involved in the search of the Plaintiffs' residence at

no time sought assistance from Charlene or Travis Leatherman to remedy any inconvenience to the officers which could have been caused by the presence of the dogs on the premises during the search.

22.

The Leathermans allege that the manner in which the search of their home was carried out by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their house against unreasonable searches as protected by the Fourth Amendment to the United States Constitution. Plaintiffs would show in this connection that the actions of the officers when searching their home, including but not limited to the shooting of the Leatherman family dogs, were objectively unreasonable under the facts and circumstances as they existed at the time such actions were taken.

23.

The Leathermans allege that Defendant TCNICU is liable to them pursuant to 42 U.S.C. Section 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant TCNICU were undertaken under color of law; that Defendant TCNICU failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the



duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant TCNICU, by and through its official policymaker Tim Curry, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 21.

## 24.

The Leathermans allege that Defendant Tarrant County is liable to Plaintiffs pursuant to 42 U.S.C. Section 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant Tarrant County were undertaken under color of law; that Defendant Tarrant County failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant Tarrant County, by and through its official policymaker Don Carpenter, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 21.

## 25.

The Leathermans allege that Defendant City of Lake Worth is liable to them pursuant to 42 U.S.C. Section 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 21.

## 26.

The Leathermans allege that Defendant TCNICU is liable to Plaintiffs pursuant to 42 U.S.C. Section 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant TCNICU were undertaken under color of state law; that Defendant TCNICU failed to formulate and



implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant TCNICU, by and through its official policymaker Tim Curry, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 22.

27.

The Leathermans allege that Defendant Tarrant County is liable to Plaintiffs pursuant to 42 U.S.C. Section 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant Tarrant County were undertaken under color of state law; that Defendant Tarrant County failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant Tarrant County, by and through its official policymaker Don Carpenter, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in

this paragraph was a substantial factor or cause of the violation alleged in paragraph 22.

28.

The Leathermans allege that Defendant City of Lake Worth is liable to Plaintiffs pursuant to 42 U.S.C. Section 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of state law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Lake Worth, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of violation alleged in paragraph 22.

## COUNT II

29.

Plaintiff Gerald Andert alleges that his being struck on the head with a club without provocation, as alleged in paragraph 13 of this First Amended Complaint,

deprived him of his right to be secure in his person against unreasonable seizure as protected by the Fourth Amendment to the United States Constitution. In this connection Plaintiff Gerald Andert would show that the actions taken by the seizing officer, including but not limited to the act of striking Plaintiff with a club, was objectively unreasonable under the facts and circumstances as they existed at the time such actions were taken.

30.

Plaintiffs Gerald Andert, and Kevin and Jerri Lealos, individually and in their capacities as next of friends to Shane and Tavor Lealos, each being residents of the Lealos house, allege that the manner in which the search of their home was carried out by agents of Defendant TCNICU and Defendant City of Grapevine deprived them of their right to be secure in their house against unreasonable searches and seizures as protected by the Fourth Amendment to the United States Constitution. Plaintiffs would show that the acts of the agents of Defendant TCNICU and Defendant City of Grapevine, including but not limited to the unannounced forcible entry into the Lealos home, the unprovoked clubbing of Gerald Andert (a 64 year old grandfather), and the flow of obscenities and threats shouted at family members present, were objectively unreasonable under the facts and circumstances as they existed at the time such actions were taken.

31.

Plaintiff Gerald Andert alleges that Defendant TCNICU is liable to him pursuant to 42 U.S.C. Section 1983 for the unreasonable seizure of his person as alleged in paragraph 29 of this First Amended Complaint. Specifically, Plaintiff alleges the unidentified officer who struck him with a club without provocation was acting as an agent of Defendant TCNICU; that the unidentified officer on the occasion in question was acting under color of law; that Defendant TCNICU failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant TCNICU, by and through its official policymaker Tim Curry, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiff Gerald Andert further alleges that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 29.

32.

Plaintiff Gerald Andert alleges that Defendant City of Grapevine is liable to him pursuant to 42 U.S.C. Section 1983 for the unreasonable seizure of his person as alleged in paragraph 29 of this First Amended Complaint. Specifically, Plaintiff alleges the unidentified officer who struck him with a club without provocation was acting as

an agent of Defendant City of Grapevine; that the unidentified officer on the occasion in question was acting under color of law; that Defendant City of Grapevine failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Grapevine, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiff Gerald Andert further alleges that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 29. —

33.

Plaintiffs Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos and Trevor Lealos allege that Defendant TCNICU is liable to them for the unconstitutional manner in which the search of their home was carried out as alleged in paragraph 30 of this First Amended Complaint. Specifically, these Plaintiffs allege that agents of Defendant TCNICU participated in the unconstitutional search alleged; that said agents of Defendant TCNICU on the occasion in question were acting under color of law; that Defendant TCNICU failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties

commonly assigned to officers who execute search warrants, the need for additional or different training was so that the conduct of Defendant TCNICU, by and through its official policymaker Tim Curry, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of violation alleged in paragraph 30.

34.

Plaintiffs Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos and Trevor Lealos allege that Defendant City of Grapevine is liable to them for the unconstitutional manner in which the search of their home was carried out as alleged in paragraph 30 of this First Amended Complaint. Specifically, these Plaintiffs allege that agents of Defendant City of Grapevine participated in the unconstitutional search alleged; that said agents of Defendant City of Grapevine on the occasion in question were acting under color of law; that Defendant City of Grapevine failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Grapevine, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to



train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 30.

### COUNT III

35.

All Plaintiffs named in this First Amended Complaint allege that the search warrants which authorized the searches of the Leatherman and Lealos residences were invalid when issued as each were unsupported by a showing of probable cause necessary for the issuance of a valid warrant under the Fourth Amendment to the United States Constitution. Specifically, Plaintiffs allege that the affidavits relied upon by the issuing magistrates, and which separately provided the factual basis for the issuance of the Leatherman and the Lealos warrants, disclose no more than that "odors associated" with clandestine drug manufacturing laboratories had allegedly been detected by law enforcement officers. Plaintiffs allege that an "odor associated" with clandestine drug manufacturing, without more, is insufficient as a matter of law to establish probable cause for the issuance of a search warrant.

36.

The Leathermans allege that Defendant TCNICU is liable to them pursuant to 42 U.S.C. Section 1983 for all damages resulting from the unreasonable search of their home executed under authority of the warrant alleged to be invalid in paragraph 35 of this First Amended Complaint. The Leathermans allege that it is and was on the

occasion in question, the custom and practice of Defendant TCNICU and its law enforcement personnel to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of "odors associated" with illegal drug manufacturing. The Leathermans allege that the aforementioned custom and practice is so persistent and widespread that the official policymaker of Defendant TCNICU, Tim Curry, either knew or should have known of the alleged custom and practice. The Plaintiffs further allege that the custom and practice referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 35.

37.

Plaintiffs Gerald Andert, Kevin and Jerri Lealos, individually and in their capacities as next of friends of Shane and Trevor Lealos, each being residents of the Lealos house, allege that Defendant TCNICU is liable to them pursuant to 42 U.S.C. Section 1983 for all damages resulting from the unreasonable search of their home executed under authority of the warrant alleged to be invalid in paragraph 35 of this First Amended Complaint. The Plaintiffs named in this paragraph allege that it is and was on the occasion in question, the custom and practice of Defendant TCNICU and its law enforcement personnel to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of "odors associated" with illegal drug manufacturing. These Plaintiffs allege that the aforementioned custom and practice was so persistent and widespread that the official policymaker of Defendant TCNICU, Tim



Curry, either knew or should have known of the alleged custom and practice. The Plaintiffs further allege that the custom and practice referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 35.

38.

Plaintiffs Gerald Andert, Kevin and Jerri Lealos, individually and in their capacities as next of friends of Shane and Trevor Lealos; Pat Lealos; Donald Andert; and Lucy Andert; each allege that the seizure of their persons under authority of the warrant alleged to be invalid in paragraph 35 of this First Amended Complaint, deprived them of their rights to be secure in their persons against unreasonable seizure as protected by the Fourth Amendment to the United States Constitution. These Plaintiffs allege that Defendant TCNICU is liable to them pursuant to 42 U.S.C. Section 1983 for all damages resulting from the aforementioned unconstitutional seizures of their persons; that it is and was on the occasion in question, the custom and practice of Defendant TCNICU and its law enforcement personnel to prepare affidavits and cause the issuance and execution of search warrants predicated on no more than the detection of "odors associated" with illegal drug manufacturing; that the custom and practice described above was so persistent and widespread that the official policymaker of Defendant TCNICU, Tim Curry, either knew or should have known of the alleged custom and practice; and, that the custom and practice referred to in this paragraph was a substantial factor or cause of the unconstitutional seizures of their persons.

#### COUNT IV

#### Relief Sought

39.

As a result of the violations of the Plaintiffs' rights alleged in this First Amended Complaint, all Plaintiffs named herein have wrongfully suffered anger, anguish, sleeplessness, humiliation and embarrassment, all of which has caused each Plaintiff to be damaged in an amount to be determined by a jury.

40.

All Plaintiffs named herein would further show the Court that as a result of the violations described in this First Amended Complaint, they have been required to employ the undersigned attorneys to represent them in obtaining the redress sought, and therefore Plaintiffs request that upon final judgment, or earlier as may be appropriate, the Court award them their reasonable attorney's fees pursuant to 42 U.S.C. Section 1988.

41.

All Plaintiffs named herein request a jury trial of this cause.

WHEREFORE, Plaintiffs pray that the Defendants be served with process and required to answer herein and that upon final hearing this Court:

a) Vindicate the Leathermans' right to be secure in their effects against unreasonable seizure, as protected by the Fourth and Fourteenth Amendments to the United

States Constitution, and enter judgment declaring the unjustified shooting of Plaintiffs' pets by agents of the Defendants TCNICU, Tarrant County and City of Lake Worth in violation of that right;

b) Vindicate the Leathermans' right to be secure in their house against unreasonable search, as protected by the Fourth and Fourteenth Amendment to the United States Constitution, and enter judgment declaring the manner in which the search of the Leathermans' home was carried out by agents of the Defendants TCNICU, Tarrant County and City of Lake Worth, in violation of that right;

c) Vindicate the Leathermans' right to be secure in their house against unreasonable search, as protected by the Fourth and Fourteenth Amendments to the United States Constitution, and enter judgment declaring the warrant which authorized the search of the Leatherman home invalid due to its issuance without a showing of probable cause, and the issuance and execution of said warrant by agents of Defendants TCNICU, Tarrant County and City of Lake Worth, in violation of that right;

d) Vindicate Plaintiff Gerald Andert's right to be secure in his person against unreasonable seizure, as protected by the Fourth and Fourteenth Amendments to the United States Constitution, and enter judgment declaring the manner in which the seizure of Gerald Andert was carried out by agents of Defendants TCNICU and City of Grapevine in violation of that right;

e) Vindicate the rights of Plaintiffs Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos and Trevor Lealos to be secure in their house against unreasonable

search, as protected by the Fourth and Fourteenth Amendments to the United States Constitution, and enter judgment declaring the manner in which the search of their home was carried out by agents of Defendants TCNICU and City of Grapevine in violation of that right;

f) Vindicate the rights of Plaintiffs Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos and Trevor Lealos to be secure in their house against unreasonable search, as protected by the Fourth and Fourteenth Amendment to the United States Constitution, and enter judgment declaring the warrant which authorized the search of these Plaintiffs' home invalid due to its issuance without a showing of probable cause, and the issuance and execution of said warrant by agents of Defendants TCNICU and City of Grapevine in violation of that right;

g) Vindicate the rights of Plaintiffs Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, Trevor Lealos, Pat Lealos, Donald Andert and Lucy Andert, to be secure in their persons against unreasonable seizure as protected by the Fourth and Fourteenth Amendments to the United States Constitution, and enter judgment declaring the seizure of these Plaintiffs pursuant to the execution of the invalid search warrant for the Andert home, in violation of that right;

h) Award each of the Plaintiffs named herein their actual damages against Defendants as may be shown;

i) Award each of the Plaintiffs named herein their reasonable attorney's fees for prosecution of this suit as authorized by 42 U.S.C. Section 1988;

/s/ Don Gladden  
DON GLADDEN



Narcotics Intelligence and Coordination Unit; TARRANT COUNTY, TEXAS; and DON CARPENTER, in his Official Capacity as Sheriff of Tarrant County, Texas; Defendants, in the above numbered and entitled cause respectfully submit herewith their Motion to Dismiss or for Summary Judgment, pursuant to Rules 12(b)(6) and 56, FED. R. CIV. PROC., and show:

I.

The Amended Complaint fails to state any claim upon which relief may be granted because:

(a) The alleged policy of Defendants to seek and obtain search warrants based on the detection by experienced and competent law enforcement officers of the distinctive odors associated with the manufacture of illicit drugs by clandestine drug laboratories is not unconstitutional.

(b) Only broad conclusions are alleged and no material allegations of specific facts sufficient to show a policy of "deliberate indifference" to the constitutional rights of the public by failure to properly train the law enforcement officers under the control of Defendants are alleged:

(i) Identifying the specific deficiency in training alleged to have caused the injury of which Plaintiffs complain;

(ii) Showing a "close causal nexus" between the alleged failure to train and the injury alleged;

(iii) Indicating a pattern or series of incidents of widespread constitutional violations to which Defendants

are alleged to have been deliberately indifferent by failure to provide proper training; or

(iv) Identifying any specific constitutional limitation in the execution of search warrants as to which Defendants have been deliberately indifferent through failure to train their officers.

(c) The Tarrant County Narcotics and Intelligence Unit is not a "person" susceptible to suit under 42 U.S.C. § 1983.

(d) Claims for "emotional distress" do not rise to the level of constitutional issues actionable under 42 U.S.C. § 1983.

(e) Threats and verbal abuse do not rise to the level of a constitutional issues actionable under 42 U.S.C. § 1983.

(f) No "severe injury" is alleged which is necessary in order to state a claim under 42 U.S.C. § 1983.

(g) The detention of Plaintiffs by the law enforcement officers while conducting the search authorized by the warrants is not unconstitutional.

(h) The manner of the service of the warrants is discretionary with the law enforcement officers and "unauthorized entry" of Plaintiffs' premises for the service thereof does not violate the 4th Amendment.

(i) There is no allegation in the Complaint that there is no adequate state postdeprivation remedy readily available to Plaintiffs' for the destruction of the dogs.

## II.

There are no genuine issues of material fact for trial of this cause and Defendants are entitled to judgment as a matter of law because:

(a) Defendants cannot be held liable under the doctrine of respondeat superior or any theory of vicarious liability.

(b) The Tarrant County Narcotics and Intelligence Unit is not a "person" susceptible to suit under 42 U.S.C. § 1983.

(c) The summary judgment evidence shows:

(i) The searches were conducted pursuant to valid warrants;

(ii) That the officers' use of force on the occasions in question was necessary and justified; and

(iii) No "serious injury" was received by Gerald Andert.

## III.

This motion is supported by the admissions in the pleading and the Exhibits and Attachments submitted with this motion.

WHEREFORE, premises considered, Defendants pray that the Court dismiss Plaintiffs' complaint for failure to

state a claim upon which relief may be granted, or in the alternative, for summary judgment.

Respectfully submitted,

TIM CURRY  
CRIMINAL DISTRICT ATTORNEY  
TARRANT COUNTY, TEXAS

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.  
Assistant District Attorney  
State Bar No. 19960000  
200 West Belknap  
Fort Worth, TX. 76196-0201  
(817) 334-1233

/s/ Barrie Howard  
BARRIE HOWARD  
Assistant District Attorney  
State Bar No. 10061720  
200 West Belknap  
Fort Worth, TX. 76196-0201  
(817) 334-1233

ATTORNEYS FOR DEFENDANTS  
TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION  
UNIT, TARRANT COUNTY, TEXAS,  
TIM CURRY, AND DON CARPENTER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Motion to dismiss or for Summary Judgment was this day served upon the Plaintiffs' attorneys of record, Don Gladden, Law Offices of Don Gladden, P.O. Box 50686, Fort Worth, Texas 76105, and William W. Harris, Esq., 1901 Central Drive #208, Bedford, Texas

76021, in accordance with the provisions of Rule 5, FED.  
R. CIV. PROC. on this the 17th day of April, 1990.

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN and §  
KENNETH LEATHERMAN, §  
Individually and as Friends of TRAVIS §  
LEATHERMAN; GERALD ANDERT; §  
KEVIN LEALOS and JERRI LEALOS, §  
Individually and as Next Friends of §  
SHANE LEALOS and TRAVOR §  
LEALOS; PAT LEALOS; DONALD §  
ANDERT; and LUCY ANDERT, §

Plaintiffs §

vs. §

THE TARRANT COUNTY NARCOTICS §  
INTELLIGENCE AND §  
COORDINATION UNIT; TIM CURRY, §  
in his Official Capacity as Director of §  
the Tarrant County Narcotics §  
Intelligence and Coordination Unit; §  
TARRANT COUNTY, TEXAS; DON §  
CARPENTER, in his Official Capacity §  
as Sheriff of Tarrant County, Texas; §  
CITY OF LAKE WORTH, TEXAS; and §  
CITY OF GRAPEVINE, TEXAS, §

Defendants §

CIVIL  
ACTION  
NUMBER  
§ CA4-89-842-K

AFFIDAVIT OF TIM CURRY

THE STATE OF TEXAS §  
§  
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day  
personally appeared TIM CURRY, who by me having  
been duly sworn made the following affidavit:

My name is Tim Curry. I am above the age  
of 21 years, fully competent to make this affi-  
davit, and have personal knowledge of the mat-  
ters of material fact hereinafter set forth, which  
are true and correct.

At all times relevant and material to this  
cause I have been the Criminal District Attorney  
of Tarrant County, Texas.

The Tarrant County Narcotics Intelligence  
and Coordination Unit (N.I.C.U.) is a "Project"  
to provide a multi-jurisdictional drug task force  
with a centralized coordination unit. It was  
formed in 1988 and is funded primarily through  
grants received from the federal government  
through the Governor's Office of the State of  
Texas, Criminal Justice Division, to Tarrant  
County. I am Chairman of the Board of Directors  
and Project Director. The N.I.C.U. is not a sepa-  
rate governmental entity from Tarrant County.

Attached hereto as Attachment 1 is a true  
copy of the Form 424 for the current year con-  
cerning the application for the grant.

Attached hereto as Attachment 2 is a true  
copy of the Interlocal Assistance Agreement of



the Tarrant County Intelligence and Coordination Unit.

Attachments 1 and 2 are business records kept in the regular course of business in the Office of the Criminal District Attorney. They were prepared at or near the time of the fact or event recorded by persons having actual knowledge, and it is the regular course of business to keep such records. I am the custodian of the records of the Office of the Criminal District Attorney of Tarrant County, Texas, and they are kept under my supervision and control.

It is not the policy of the N.I.C.U. to arrest without probable cause, to conduct warrantless searches and seizures without probable cause, or to violate the civil liberties of the citizens within its jurisdiction. It is the policy to obtain search warrants from a duly authorized magistrate prior to conducting a search of property. Only reasonable force may be used where necessary by the N.I.C.U. officers in executing any search warrant so obtained.

Further, affiant sayeth not.

/s/ Tim Curry  
TIM CURRY

THE STATE OF TEXAS §  
§  
COUNTY OF TARRANT §

Sworn to and subscribed before me by the said TIM CURRY on this the 16th day of April, 1990.

[SEAL] ANGELA DAWN PHILLIPS  
NOTARY PUBLIC  
THE STATE OF TEXAS  
COMMISSION EXPIRES  
9-22-90

/s/ Angela Dawn Phillips  
Notary Public in and for  
the State of Texas

/s/ Angela Dawn Phillips  
Notary's Printed Name

My commission expires:  
9/22/90

EXHIBIT  
A  
A-7

EXHIBIT A  
Att 2

THE STATE OF TEXAS                 )  
  )  
COUNTY OF TARRANT                 )

**THE TARRANT COUNTY**  
**NARCOTICS INTELLIGENCE AND COORDINATION**  
**UNIT INTERLOCAL ASSISTANCE AGREEMENT**

**WHEREAS**, the detection and apprehension of individuals in the field of narcotics manufacturing and distribution is often hindered because the range of operations of the criminal offender is greater than the jurisdiction of the peace officers called upon to investigate the crime; and,

**WHEREAS**, the existence of a multiplicity of political jurisdictions in Tarrant County impedes the effectiveness of individual law enforcement agencies to detect and eradicate narcotics activity; and,

**WHEREAS**, past experience has indicated that a cooperative effort between law enforcement agencies and the Tarrant County District Attorney's Office has been effective in detecting and deterring the activities of targeted criminal groups to the mutual benefit of all the political entities of Tarrant County; and,

**WHEREAS**, pursuant to Art. 999b, TEX. REV. CIV. STAT. ANN. authorizing the formation of mutual aid law enforcement units, the contracting cities, County of Tarrant and Tim Curry Criminal District Attorney of Tarrant County hereby agree to participate in, and be a part of a cooperative investigative and enforcement effort to be



known and designated as the Tarrant County Narcotics Intelligence and Coordination Unit ("NICU"); and,

**WHEREAS**, a grant of money from the Criminal Justice Division of the Governor's Office of the State of Texas has been received to fund the establishment of the Tarrant County Narcotics Intelligence and Coordination Unit.

**NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:**

That Tarrant County, acting by and through Roy English, its duly authorized County Judge, Tim Curry, Criminal District Attorney of Tarrant County, and the following cities executing duplicate originals hereof, acting herein by and through their duly authorized chief administrative officer:

Arlington	Keller
Azle	Kennedale
Bedford	Lakeside
Benbrook	Lake Worth
Blue Mound	Mansfield
Burleson	North Richland Hills
Colleyville	Pantego
Crowley	Pelican Bay
Dalworthington	Richland Hills
Gardens	River Oaks
Eules	Saginaw
Everman	Sansom Park
Forest Hills	Southlake
Fort Worth	Watauga
Grand Prairie	Westover Hills
Grapevine	Westworth Village
Haltom City	White Settlement
Hurst	

do hereby covenant and agree as follows:

### NICU STRUCTURE

The Tarrant County Narcotics Intelligence and Coordination Unit ("NICU") will be a part of the Tarrant County District Attorney's Office for administrative purposes. The activities of the NICU shall be supervised by a six member Board of Governors. This Board will consist of the Fort Worth Chief of Police, the Arlington Chief of Police, the Sheriff of Tarrant County, a Police Chief from the Northeast Tarrant County area to be selected by participating agencies in the Northeast Tarrant County Unit, a Chief of Police from a small police department within Tarrant County, and a chairperson, who shall be the Tarrant County District Attorney. *Ex Officio* members representing the Texas Department of Public Safety, the Drug Enforcement Administration and the Federal Bureau of Investigation shall be added to the Board of Governors as non-voting members.

The Board of Governors shall have the responsibility for policy, direction and control of NICU. The Board of Governors will have direct responsibility for the selection of a Commander for NICU. The Board will monitor the activities and accomplishments of NICU to ensure orderly progress towards attainment of all stated objectives.

There will be four enforcement units to operate in the four geographic areas of Tarrant County. These units will be known as The Greater Arlington Unit, The Greater Fort Worth Unit, The Tarrant County Unit and The Northeast Tarrant County Unit. The activities and investigations of these four units shall be coordinated by the

Commander of NICU. These units will be responsible for narcotics investigations within their geographical areas.

#### NARCOTIC INVESTIGATION

Narcotics investigations within the jurisdictional bounds of the political entities joining this agreement will be coordinated through NICU. All narcotic complaints and intelligence received by a law enforcement agency that is a party to this agreement will be referred to either NICU or the appropriate geographical area unit for investigation. NICU will maintain intelligence files. The geographical area units will respond to complaints in a timely manner.

#### ASSET SEIZURES

All asset seizures developed by NICU and the four geographic enforcement units will be prosecuted by the Asset Seizure Team of NICU. The attorneys in NICU will be responsible for representing the State of Texas and NICU in all forfeiture proceedings maintained under the provisions of the Controlled Substances Act of Texas.

There is hereby created a certain fund to be known as the NICU Asset Seizure Fund, (hereinafter called "Fund"), said Fund to be created in compliance with Sec. 5.08 of the Texas Controlled Substances Act, TEX. REV. CIV. STAT. ANN. Art. 4476-15.

All money, certificates of deposit, negotiable instruments, securities, stocks, bonds, businesses or business investments, contractual rights, real estate, personal property or other things of value derived from the sale,

manufacture, distribution, dispensation, delivery or other commercial undertaking violative of the Texas Controlled Substances Act shall be forfeited to the organization formed hereby, NICU.

Upon entry of a judgment in a forfeiture proceeding awarding monies or other proceeds as set out above to NICU, said monies or proceeds will be immediately deposited in the NICU Asset Seizure Fund. The monies and proceeds in this Fund must be used to further the purpose of NICU as required by the NICU grant award.

This Fund shall be subject to audit by the Auditor of Tarrant County, Texas.

If any conveyance or vehicle is the subject of a final forfeiture, it shall be awarded to the NICU to be used to further the purpose of NICU as required by the NICU grant award.

#### OFFICER STATUS

Any law enforcement officer assigned to the NICU or one of the four geographical units by a governmental entity which is a party to this agreement shall be empowered to enforce all laws and ordinances applicable in the jurisdiction of the said entities joining in this agreement, including the power to make arrests, execute search warrants, and investigate narcotics offenses outside of the jurisdiction from which he is assigned, but within the area covered by the jurisdictions of the entities which are parties to this agreement.

While functioning as a law enforcement officer assigned to the NICU or one of the four geographical

units in a jurisdiction other than the jurisdiction from which he is assigned, he shall have all the law enforcement powers of a regular law enforcement officer of such other political entity.

A law enforcement officer who is assigned, designated or ordered by the official designated by the governing body of an entity to perform law enforcement duties as a member of NICU or one of the four geographical units shall receive the same wage, salary, pension and all other compensation and all other rights for such service, including injury or death benefits and workmen's compensation benefits, as though the service had been rendered within the limits of the entity from which he was assigned. Recognizing the benefits to a participating entity to this agreement, it is agreed that all wage and disability payments, including workmen's compensation benefits, pension payments, damage to equipment and clothing, medical expense and expenses of travel, food and lodging, shall be paid by the entity from which said peace officer is assigned except as hereinafter provided.

In further recognition of the benefit to be gained by the entity participating in NICU, it is agreed that no entity that is a party to this agreement shall receive from another entity participating in this agreement or be entitled to reimbursement for any services performed pursuant to this agreement.

It is further agreed that, in the event that any law enforcement officer assigned to NICU or one of the four geographical units shall be cited as a defendant party to any civil lawsuit, state or federal, arising out of his official acts while functioning as a law enforcement officer

assigned to NICU or one of the four geographical units, said law enforcement officer shall be entitled to the same benefits that such officer would be entitled to receive had such civil action arisen out of an official act within the scope of his duties as a member and in the jurisdiction of the law enforcement agency from which he was assigned. Further, no entity shall be responsible for the civil acts of a law enforcement officer of another entity assigned to NICU or one of the four geographical units except as may be decreed by the judgment of a court of competent jurisdiction.

#### GENERAL PROVISIONS

This Contract is subject to all grant conditions applicable to the existing grant of the Criminal Justice Division of the Governor's Office to the Tarrant County Narcotics Intelligence and Coordination Unit, a copy of which is attached hereto.

Each party to this agreement expressly waives all claims against every other party for compensation for any loss, damage, personal injury, or death occurring as a consequence of the performance of this agreement.

Third party claims against members shall be governed by the Texas Tort Claims Act or other appropriate statutes, or laws of the State of Texas.

It is expressly understood and agreed that, in the execution of this agreement, no party waives, nor shall be deemed hereby to waive, any immunity or defense that would otherwise be available to it against claims arising in the exercise of governmental powers and functions.



The validity of this agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of Texas.

In case any one or more of the provisions contained in this agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained therein.

This agreement shall become effective between the parties hereto on the day following execution of the agreement by a party, and shall continue in effect until it has been terminated or rescinded by appropriate action of an entity's governing body.

This agreement may be amended or modified by the mutual agreement of the parties hereto in writing to be attached to and incorporated into this agreement.

This instrument contains all commitments and agreements of the parties, and oral or written commitments contained herein shall have no force or effect to alter any term or condition of this agreement.

The parties agree that their collective agreement may be evidenced by the execution of an identical counterpart of this instrument by the duly authorized official(s) of each participant and the failure of any member to enter into this agreement shall not affect the agreement between and among the parties executing the agreement.

Signed this 17 day of January, 1988.

COUNTY OF TARRANT,  
TEXAS

By: /s/ Roy English  
**ROY ENGLISH**  
County Judge

APPROVED AS TO  
FORM AND LEGALITY

By: \_\_\_\_\_  
City Attorney for  
Southlake

TARRANT COUNTY  
CRIMINAL DISTRICT  
ATTORNEY'S OFFICE

By: /s/ Tim Curry  
**TIM CURRY,**  
Criminal District  
Attorney

CITY OF SOUTHLAKE

By: /s/ illegible  
Mayor \_\_\_\_\_, City of  
Southlake

## EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN and §  
KENNETH LEATHERMAN, §  
Individually and as Friends of TRAVIS §  
LEATHERMAN; GERALD ANDERT; §  
KEVIN LEALOS and JERRI LEALOS, §  
Individually and as Next Friends of §  
SHANE LEALOS and TRAVOR §  
LEALOS; PAT LEALOS; DONALD §  
ANDERT; and LUCY ANDERT, §

Plaintiffs §

vs. §

THE TARRANT COUNTY NARCOTICS §  
INTELLIGENCE AND §  
COORDINATION UNIT; TIM CURRY, §  
in his Official Capacity as Director of §  
the Tarrant County Narcotics §  
Intelligence and Coordination Unit; §  
TARRANT COUNTY, TEXAS; DON §  
CARPENTER, in his Official Capacity §  
as Sheriff of Tarrant County, Texas; §  
CITY OF LAKE WORTH, TEXAS; and §  
CITY OF GRAPEVINE, TEXAS, §

Defendants §

CIVIL  
ACTION  
NUMBER  
§ CA4-89-842-K

AFFIDAVIT OF MIKE ADAIR

THE STATE OF TEXAS §  
§  
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared MIKE ADAIR, who by me having been duly sworn made the following affidavit:

My name is Mike Adair. I am above the age of 21 years, fully competent to make this affidavit, and have personal knowledge of the matters of material fact hereinafter set forth, which are true and correct.

At all times relevant and material to this cause I have been the Assistant Director of the Tarrant County Narcotics Intelligence and Coordination Unit (N.I.C.U.). I am deputy custodian of the records, and they are maintained under my supervision and control.

Attached hereto as Attachments 1 and 2 are true copies of the Search and Arrest Warrant and Affidavit, dated May 20, 1989, concerning the premises at 8204 Cohoba Street in the City of Fort Worth, Texas.

Attached hereto as Attachments 3 and 4 are true copies of Offense Report 89TF70 and Supplemental Report 89TF70 concerning the execution of the Search and Arrest Warrant, dated May 20, 1989, of the premises at 8204 Cohoba Street in the City of Fort Worth, Texas.

Also attached hereto as Attachment 5 is a true copy of Tactical Operations Report No. 98-T-005, dated May 20, 1989, of the Lake Worth

Police Department. This report was made by a law enforcement officer in the regular course of his duties to report matters which he is required by law to observe and report.

Attachments 1 through 5 are records kept or received in the regular course of business by N.I.C.U. It is the regular course of business to keep and receive such records. They are kept and received by persons having actual knowledge thereof at or near the time of the fact or event recorded.

At the time of the execution of the warrant described above the officers advise that they encountered two large dogs, a doberman and a German shepherd, on the premises. There was no one present to control them. These dogs were threatening to attack the officers and it was necessary for the officers to destroy them for the protection of the officers.

Except for the shooting of the dogs, no guns were drawn and no threats were made against Charlene Leatherman or her son. It was not necessary to break in the door in order to gain entry to the residence on the property, and no property damage was done to the property or possessions of the occupants by the officers, except for the shooting of the dogs.

Further, affiant sayeth not.

/s/ Mike Adair  
MIKE ADAIR

THE STATE OF TEXAS   §  
                                  §  
COUNTY OF TARRANT   §

SWORN to and subscribed before me by the said MIKE ADAIR on this the 11th day of APRIL, 1990.

(Seal)

/s/ Karen Brock  
Notary Public in and for the  
State of Texas

/s/ Karen Brock  
Notary's Printed Name

My commission expires: 10-5-92

\_\_\_\_\_  
EXHIBIT B  
Att 1

WARRANT NO: 8905115

THE STATE OF TEXAS )(   
SEARCH AND  
ARREST WARRANT  
COUNTY OF TARRANT)(

THE STATE OF TEXAS to the Sheriff or any Peace Officer of Tarrant County, Texas or any Peace Officer of the State of Texas:



## GREETINGS:

WHEREAS, the Affiant whose signature is affixed to the affidavit appearing on the reverse hereof is a Peace Officer under the laws of Texas, and did heretofore this day subscribe and swear to said Affidavit before me (WHICH SAID AFFIDAVIT IS BY THIS REFERENCE INCORPORATED HEREIN FOR ALL PURPOSES) and whereas I find that the verified facts stated by the Affiant in said Affidavit show that the Affiant has probable cause for the belief he expresses therein, and establishes the existence of proper grounds for the issuance of this warrant.

NOW THEREFORE, you are commanded to enter the suspected place and premises described in said affidavit and to there search for the property described in said affidavit, and to seize the same and bring it before me, and you are commanded to arrest and bring before me each person described and accused in said affidavit. Herein fail not, but you have then and there this warrant within three days, exclusive of the day of its execution, with your return thereon, showing how you have executed the same.

/s/ Rolly Milliron  
MAGISTRATE, TARRANT  
COUNTY, TEXAS

DATE: 8-20-89

TIME: 6:10 P.M.

## EXHIBIT B

Att 2

WARRANT NO: 8905115

## AFFIDAVIT FOR SEARCH AND ARREST WARRANT

THE STATE OF TEXAS )(  
COUNTY OF TARRANT )

The undersigned affiant, being a Peace Officer under the laws of Texas and being duly sworn on oath makes the following statements and accusations:

1. THERE IS IN TARRANT COUNTY, TEXAS A SUSPECTED PLACE AND PREMISES DESCRIBED AND LOCATED AS FOLLOW:

Located at 8204 Cahoba Street in the City of Ft. Worth, Texas. Described as double wide mobile home with a siding glass door which faces west towards Cahoba Street. The mobile home is brown in color and trimmed in white. The drive way to the mobile home runs east off of Cahoba Street, to a cattle gate which has a chain and pad locked attached. There are two vehicles by the mobile home and they are described as a VW Bug bearing Texas License 814-XCP and a Chevrolet Chevette bearing Texas License 291-KKK.

2. THERE IS AT SAID SUSPECTED PLACE AND PREMISES PROPERTY CONCEALED AND KEPT IN VIOLATION OF THE LAWS OF TEXAS AND DESCRIBED AS FOLLOWS:

Amphetamines, Methamphetamine, and precursors chemicals associated with the manufacture of amphetamines, or any other controlled substances and paraphernalia that are kept in violation of the law.

3. SAID SUSPECTED PLACE AND PREMISES ARE IN CHARGE OF AND CONTROLLED BY EACH OF THE FOLLOWING PERSON/PERSONS:

1. Charlene Clark Leatherman W/F DOB 09-12-52
2. Marion Leatherman M/W DOB unknown

4. IT IS THE BELIEF OF AFFIANT, AND HE HEREBY CHARGES AND ACCUSES THAT:

Charlene Clark Leatherman, Marion Leatherman, and others unknown by name or description are now concealing at the said suspected premises Amphetamines, methamphetamine, or any other controlled substance or paraphernalia that are a violation of the law.

5. AFFIANT HAS PROBABLE CAUSE FOR THE SAID BELIEF BY REASON OF THE FOLLOWING FACTS, TO-WIT:

On 5-20-89 Officer G.H. Libbey #101 With the Lake Worth Police Department was on patrol on Hiawatha Trail in Lake Worth when he smelled a strong chemical odor associated with illegal manufacture of amphetamines. Officer Libbey knew this chemical smell from his past training, and experience as an odor associated in the manufacturing of illegal drugs, (amphetamines). Officer Libbey could not tell exactly where the smell was coming from due to the heavily wooded area, the wind, and the darkness around the area. Officer Libbey then attempted to find the origin of the odor which led him to the

approximate area in the 8200 block of Cahoba within the city limits of Ft. Worth. Officer Libbey then called Detective J.V. McDonald with the Lake Worth Police Department and told him that he had an odor of a clandestine lab. Detective McDonald then called the Tarrant County Narcotics Intelligence and Coordination Unit (N.I.C.U.), who in return checked the suspected location.

On 5-20-89 at about 9:00 a.m. Investigator Fowler with N.I.C.U., Detective McDonald, and Officer Libbey drove by the suspected premises where they could all smell the chemical odor. At that time Investigator Fowler and Detective McDonald noted the location, and returned to the Lake Worth Police Department for further research. While at the office Investigator Fowler checked with TU electric and found that the electric service was in the names of: Charlene Clark Leatherman and Marion Leatherman. Further research showed that both subjects had no criminal history as reported. Other information showed that Charlene had a Texas Drivers License (#08239981) with an address of 8204 Cahoba Street Ft. Worth.

On 5-20-89 at 11:00 A.M. your affiant, Stephen Farrow with N.I.C.U. drove to the area and then walked through an adjoining Boy-Scout Camp (Camp Schuman), and also smelled a strong chemical odor associated with the manufacturing of amphetamines. Your affiant observed two vehicles at that location one being a VW bug, bearing Texas license #814QCP, which was not reported by MVD. The second vehicle was a Chevrolet Chevette bearing Texas LP#291-KKK. Which was reported registered to a Doris McLerran out of Gainesville, Texas. Your affiant ran checks on all above vehicles and related information. Finding no wanted or any Criminal History information.

Your affiant was at the suspected premises for about 15 minutes and saw no activity, but did however observe all the windows covered over. The odor was very strong around the residence and into the Boy-Scout camp just to the north and east of the residence.

WHEREFORE, affiant asks for the issuance of a warrant that will authorize him to search said suspected place and premises for said property and seize the same and to arrest each said described and accused person.

/s/ Stephen J. Farrow  
AFFIANT

SUBSCRIBED and SWORN to before me by said Affiant on this the 20 day of May, 1989.

/s/ Rolly Milliron  
MAGISTRATE, TARRANT  
COUNTY, TEXAS

EXHIBIT B  
Att 3

OFFENSE REPORT  
89TF70

DEFENDANT: LEATHERMAN, CHARLENE CLARK  
LEATHERMAN, MARION  
ALIAS:  
OFFENSE: POSSESSION OF A CONTROLLED  
SUBSTANCE  
OFFENSE DATE: 05/20/89

LOCATION: 8204 CAHOBA STREET,  
FORT WORTH, TX  
INVESTIGATOR: SGT. G. FOWLER, #406  
S.J. FARROW, #403  
D.R. HARRIS, #402  
J.L. PRITCHARD, #408  
SECTOR: T.C.N.I.C.U., WEST

On Saturday, 05/20/89, at approximately 0800 hrs., this Investigator, Sgt. G.L. FOWLER currently assigned to the Tarrant County Narcotics Intelligence and Coordination Unit, West Sector (TCNICU, West) was notified in reference to a possible Clandestine Lab detected in the 8200 blk. of Cohoba, in the city of Fort Worth, which had been discovered by Patrol Officer George LIBBEY of the Lake Worth Police Department.

At approximately 0900 hrs. this investigator, Sgt. FOWLER, made contact with Detective J. MCDONALD of the Lake Worth Police Department and Officer LIBBEY. Officer LIBBEY advised that he had found the chemical odor at approximately midnight and called Det. MCDONALD. Officer LIBBEY advised that TCNICU was not contacted at that time nor did Det. MCDONALD come in due to the chemical odor not being pin pointed. Officers then took this Investigator to the suspected location starting in the 2500 blk. of Hiawatha Trail which runs north and south and to the east of the suspected location. (reference mapsco 59C & D), with the wind at that time blowing towards the southeast and directly across the suspected location all officers including this Investigator



detected a strong chemical odor known through experience and training to be associated with the manufacturing of illegal drugs (Amphetamine/P2P a phase involving the P-2 cook which emits a very strong chemical odor). The road side areas were checked for possible wash dump sites but none were located. Investigators then proceeded south on Hiawatha Trail still detecting the odor described above. Investigators then turned north bound on to the 8100 blk. of Cahoba where the odor detected above diminished in strength, but was still present. Investigators then proceeded to approximately the 8200 blk. of Cahoba to a location where the chemical odor became very strong again. At that point the wind had switched and was blowing momentarily out of an eastward direction. Located off of the east side of the 8200 blk. of Cahoba was a residence that sat approximately 50 to 75 yards off of the roadway to the east in a heavily wooded area. Investigators parked on the west side of the roadway and this Investigator, Sgt. FOWLER walked along the roadway to the mailbox and driveway to this above described residence location and immediately detected the very strong chemical odor that which is known to be associated with the manufacture of illegal drugs (Amphetamines). This Investigator was at that point for approximately 2 to 3 minutes, and never lost the very strong chemical odor. This Investigator observed a dirt drive leading east from Cahoba to an aluminum cattle gate marked with a sign. "KEEP OUT", and secured with a chain and lock. The dirt drive continued east from the other side of the fence into the wooded area. A residence could not be seen from the roadway by this Investigator, but a brown and rust color Volkswagen (no

license plate known) could be seen parked on the dirt roadway. Investigators departed the area at that point and this Investigator, Sgt. FOWLER returned to the sector office and continued research of the location as well as notifying the other unit Investigators.

At approximately 1000 hrs., TU Electric notified, Mrs MUSKA was contacted, she was advised that on the west side of Cahoba were odd numbered houses with 8149 being observed on a mailbox across the street (west) and south from suspected location by this Investigator. Mrs MUSKA advised that service ran from 8149 to 8249 in that area with 8204 being the only residence on the entire east side of Cahoba. The service at 8204 was shown by TU Electric to be in the name of Marion LEATHERMAN (sister-in-law), and Charlene LEATHERMAN. Charlene LEATHERMAN having Tx DL #08239981, and SSN #559-90-6439, with service since 1987. A drivers license check with TX LIDR on #08239981 revealed the following: Charlene Clark LEATHERMAN, W/F/DOB: 09-12-52, 5'6 145 lbs., blonde hair, green eyes, address: 8204 Cahoba, Ft. Worth, TX 76135, there was no criminal history or wanted found on Charlene LEATHERMAN nor could any history or information be found on Marion LEATHERMAN what so ever. County tax records (TXXXMAP) were checked for 8204 Cahoba and found to be in the name of F.M. Daniels, (individual who gave the land to LEATHERMAN). No information could be obtained on this subject either. Attempts to check Ft. Worth Water Records Department met with negative results due to same being closed on Saturday.

At approximately 1100 hrs., Investigators FARROW and HARRIS both from TCNICU, West arrived in the area of

the 8200 blk. of Cahoba and observed the suspected place. Inv. FARROW proceeded to Camp Leroy Schuman/Boy Scouts of America Camp, which surrounds the suspected location, and walked through the heavy woods of the camp to the property line of the suspected location and in doing so also smelled a strong chemical odor associated with the manufacturing of Amphetamines. Also observed by Inv. FARROW, were two vehicles:

1. Black VW Bug  
TX 814-XCP (listed at 814-QCP in search warrant)  
No MVD record
2. Brown Chev. Chevette  
TX 291-KKC (listed as 291-KKK in search warrant)  
Registered to: G.W. McLerran  
Doris McLerran  
out of Gainesville, TX. (Also neither one wanted or having a criminal history).

Inv. FARROW observed the suspected premises for about 15 minutes and saw no activity, but did observe same to appear as a double wide mobile home, brown in color with white trim having a sliding glass door which faces west towards Cahoba Street, Inv. FARROW did note that all the windows on the suspected premises to be covered over. Inv. FARROW also noted the chemical odor being very strong around the residence and into the Boy Scout Camp just to the north and east of the residence. No dogs were observed. Inv. FARROW did advise that chemical odors associated with drug labs have been reported in the area before but never found.

At approximately 1430 hrs. Inv. HARRIS and PRITCHARD both with TCNICU, West initiated constant surveillance from the roadway (Cahoba) just outside the driveway of 8204 Cahoba, which Inv. HARRIS advised the gate to the residence was still secure, but the brown and rust color VW was not visible in the driveway.

At approximately 1530 hrs. Det. MCDONALD, L.W.P.D. rode with Ft. Worth Helicopter (Air-One), and video taped the suspected premises from the air confirming the residence as described by Inv. FARROW. Upon arrival back at Lake Worth Police Department, with the serial view tape the same, was gone over by Sgt. FOWLER, Inv. FARROW and Lt. PRAILEY, Lake Worth P.D. Tactical Commander at which time he began forming his unit and raid plan procedures.

At approximately 1630 hrs., Inv. HARRIS advised that the brown and rust color VW Bug arrived at the suspected premises occupied by what he believed to be one white male. Inv. HARRIS advised that the gate to the suspected premises was now open. This information was given to Lt. PRAILEY, Tact Commander.

At approximately 1700 hrs., Tactical member, CPL. LYONS, Lake Worth P.D., (also Boy Scout liaison) advised that all the Boy Scouts had been removed from the area to a safe location.

At approximately 1755 hrs., Tactical member, LYONS and the Boy Scout Master (name not documented) from Camp Schuman returned to the Lake Worth P.D. and advised that after being on a trail that runs right up behind the property also reported the very strong chemical odor associated with the manufacturing of Amphetamines



emitting from the suspected premises. At this time Max Courtney of Forensic Consultant Services in Ft. Worth, was contacted to respond to the raid briefing. Ft. Worth P.D. Narcotics Officer McGHEE was contacted due to suspected premises being in Ft. Worth city limits, and responded. McGHEE advised also that reports of chemical odors from drug labs have been reported in this area before, but likewise never have been pin pointed.

At 1800 hrs., Judge MILLIRON, J.P. Precinct 1, 361 Debbie Lane, Mansfield arrived to sign the warrant after attempts to contact a District Judge met with negative results. Attempts to contact Judge STANK, RITCHIE, and VALDEZ also met with negative results. The warrant was signed at 1810 hrs., and given to Lt. PRAILEY, Tactical Commander for review prior to raid briefing.

At approximately 1855 hrs., the Tactical Unit arrived on the scene with the decision made by the Tactical Commander to enter the suspected premises through the woods, north of the location, not the front gate. TCNICU, West personnel were standing by on the road way waiting for a clear signal.

At approximately 1930 hrs., the brown and rust color VW departed the suspected premises south bound on Cahoba, occupied with two subjects. Tarrant County Sheriff's Office marked unit #53. Lt. CAUBLE stopped same, bearing TX LP 007-TPH, which was registered to Kenneth W. LEATHERMAN (husband of Charlene). W/M/DOB: 10-28-47, of 8204 Cahoba. Stop was made in the 8100 blk. of Cahoba. TCSO Unit #53 assisted by Inv's HARRIS and PRITCHARD identified the operator as Charlene LEATHERMAN, W/F/DOB; 09-12-52, TX DL #08239981. The

passenger was her juvenile W/M son (name not documented). Charlene LEATHERMAN was read her rights by Inv. HARRIS at approximately 1935 hrs. Search of the drivers compartment for officers safety at 1945 hrs by Inv. PRITCHARD revealed the finding of:

1. One Colt Gout, model .45 cal., semi-automatic handgun, serial #28047B70, under the drivers seat. Which was loaded with a clip of .45 cal. ammunition, but none chambered all contained in a OD green plastic case.

The gun above as well as a 26" long wooden club were confiscated pending further investigation and the possibility of filing charges, and a receipt was given to LEATHERMAN.

At approximately 1948 hrs. shots were heard from the direction of the suspected premises.

At approximately 1952 hrs. all clear, area secured given by Lt. PRAILEY, Tactical Commander. Charlene LEATHERMAN was escorted back to the scene and at 1956 hrs. presented a copy of the search warrant by this Inv. Sgt. FOWLER. Upon contact with Lt. PRAILEY he advised this Inv. Sgt. FOWLER, that his men had shot and killed two dogs. 1 male Doberman in the north east bedroom, and 1 male Shepard in the front yard. Lt. PRAILEY advised that as he was advancing through the woods towards the suspected premises he detected the chemical odor associated with a drug lab, but upon arrival at the suspected premises and upon entering same, by way of unlocked glass door, no damage to same, found no visible clandestine lab equipment nor was the chemical odor



detected inside the residence. All buildings, the residence, and vehicles on the premises were searched by TCNICU, West Investigators; assisted by Max Courtney and Tommy Eskisis of the Forensic Consultant Services. Found on the property were numerous five gallon buckets normally found at scenes of clandestine labs. No clandestine lab equipment, chemicals, or controlled substances could be found.

At approximately 2048 hrs. Lake Worth Animal Control arrived to transport the dead animals at the request of Charlene LEATHERMAN.

At 2055 hrs. all personnel departed the scene. Video and photographs of the premises were taken by TCNICU. West Investigators.

*TCNICU, West Investigators Working Case:*

Sgt. G.L. FOWLER, #406  
D. HARRIS, #402 - Search  
S. FARROW, #403 - Video  
J. PRITCHARD, #408 - Evidence

*T.C.S.O. Reserves:*

S. Crothers - Photographs  
A. Blakeman - Evidence

← N

CASE:

89TF 70

DATE:

5-20-89

① BLACK VW  
BUG  
4 XCP, TX

② BROWN CHFD  
CHRYSLER  
291-KKC, TX

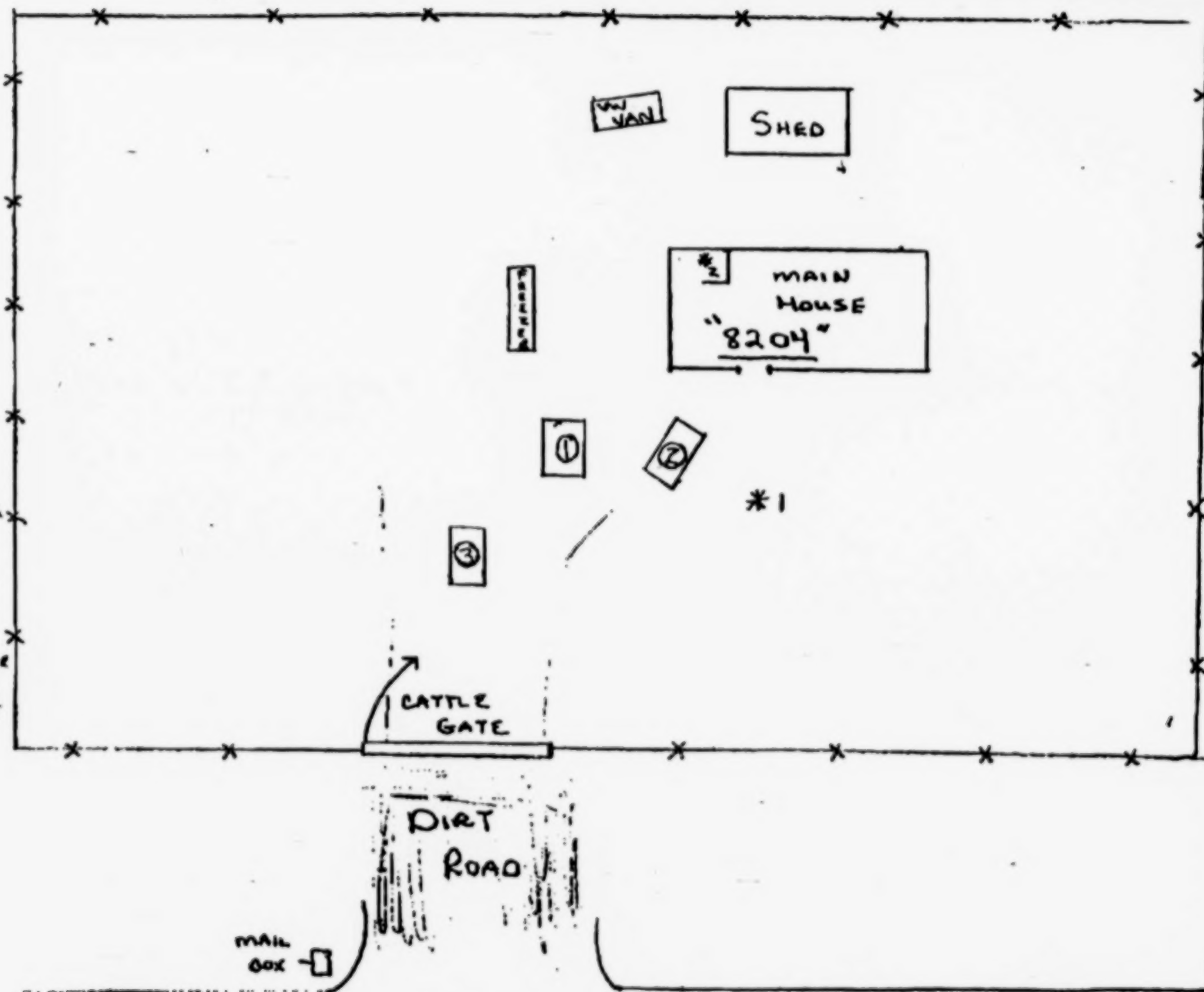
③ BROWN + RUST  
VW  
007-TPH, TX

\*1 - DEAD  
SHEPARD

\*2 - DEAD  
OUBERMAN

BY: SGT G.L. FOWLE

NOT TO SCALE



8200 BLK CANOBA

BEST AVAILABLE COPY

## EXHIBIT B

Att 4

## SUPPLEMENT REPORT

89TF70

DEFENDANT: Leatherman, Charlene Clark  
(sons name unknown)  
ALIAS: unknown  
OFFENSE DATE: 05/20/89  
LOCATION: 8204 Cahoba Street, Ft. Worth, TX  
LOCATION OF  
ARREST: Approximately 1/10 of a miles  
South of 8204 Cahoba Street  
INVESTIGATOR: D. Harris, #402  
J. Pritchard, #408/Saginaw Police  
Department  
SECTOR: T.C.N.I.C.U., WEST

At approximately 1430 hrs. Investigator Don Harris, #402 and Investigator Jackie Pritchard, #408, both of the Tarrant County Narcotics Intelligence and Coordination Unit, West Sector, initiated surveillance of a suspect premises, located at 8204 Cahoba Street, Ft. Worth per Sgt. Gary Fowler, #406 (TCNICU, West Sector).

Both Investigators conducted visual surveillance of the suspected premises across the roadway on a dirt path adjacent to the water front of Lake Worth. Both Officers observed the gate of the driveway to be closed.

At approximately 1630 hrs. both Investigators observed a brownish orange Volkswagon Bug, bearing Texas License



Plate #007-TPH, arrive at the suspected premises and enter onto the property.

At approximately 1930 hrs. both Investigators along with Lt. Cauble, of the Tarrant County Sheriff's Department Patrol Division, observed the brownish orange Volkswagen leave the residence. Inv. D. Harris requested Lt. Cauble to stop the vehicle, after advising him that Investigators of the unit had a Search and Arrest Warrant for the suspect.

Lt. Cauble stopped the vehicle approximately 1/10 of a mile South of 8204 Cahoba Street by using the lights on his marked patrol unit. After the vehicle was stopped, Inv. D. Harris and Inv. J. Pritchard pulled in front of the vehicle and exited the under cover vehicle wearing black raid jackets displaying in large white letters, on the front and back, "POLICE". Both suspects were asked to step from their vehicle. Both suspects were advised by Inv. D. Harris that a Search Warrant had been issued for their home and then both suspects were read their Miranda Warning. Inv. J. Pritchard checked the interior of the suspects vehicle and located under the drivers seat a gun case. Inside the gun case was a loaded .45 caliber Automatic Pistol with additional ammunition. Also found in the vehicle was a police baton. Mrs. Leatherman advised both the Investigators the pistol was given to her by her husband for her safety.

After explaining the reason for the Search Warrant, two gun shots were heard in the direction of 8204 Cahoba Street. Mrs. Leatherman was advised that there was a possibility that her dogs had been shot by members of the Lake Worth Police Department Tactical Unit. Investigator

D. Harris advised Mrs. Leatherman this Investigator was unsure of the time of the incident. Both suspects were asked to follow the Officers back to the suspected premises to meet with other Officers. Upon arriving at the scene, Inv. Prailey, Lake Worth Police Department Tactical Team leader, advised that two dogs had been shot and killed. One dog was shot in the front yard and the other in the back left bedroom of the house.

During a conversation with Mrs. Leatherman's son, he stated that his father told him that someone would end up killing the dogs running loose and or fighting other dogs. His father also told him that they would be better off dead because they could not afford to feed them any longer.

DRH/dmw

---

EXHIBIT B  
Att 5

LAKE WORTH POLICE DEPARTMENT  
TACTICAL OPERATION REPORT

REPORT NUMBER: 89-T-005

DATE: 05-20-89 TIME NOTIFIED: (11:15am) 15:00 Hrs C/O

LOCATION OF OPERATION:

8204 Cahoba Drive, Ft. Worth Tx

## TYPE OF OPERATION

HOSTAGE: BARRACADE:  
 WARRANT: (X) 890511S SNIPER:  
 CROWD CONTROL: SEARCH:  
 HAZ MAT: OTHER:  
 TACTICAL RESPONSE REQUESTED BY:  
 Det.J.V.McDonald #24  
 APPROVED BY: Sgt.Gary Fowler

## TAC PERSONNEL RESPONDING AND ASSIGNMENTS

1. Lt.J.R.Prailey	Outperimeter Personnel
2. Sgt.R.E.Wadkins	1. Res.Ofc.J.W.Hardin
3. Sgt.J.R.Lyons	2. Res.Ofc.J.Bell
4. Ofc.D.T.Tatsak	3. Res.Ofc.D.Sherwin
5. Ofc.M.D.Johnson	
6. Ofc.G.H.Libbey	

SITUATION: At apx 11:15 am hours, Lt.J.R.Prailey, Tactical Unit Commander was notified by Det.J.V.McDonald, Lake Worth Police Dept, and advised that a possible drug lab had been located. Det.McDonald requested that the Tac unit be placed on "Stand-by" as the unit would be called upon later in the day. Lt.Prailey was further advised that TCNICU was working on the lab, gathering information and necessary data. Det.McDonald stated that he was working with TCNICU personnel at this time. Upon completing the conversation, Lt.Prailey notified respective Tac unit personnel that they were on stand-by until further notice.

At approximately 15:00 hrs, the TAC Unit was called out to assemble at the LWPd. By 15:30 hrs all team members were assembled.

At approximately 15:40 hrs Lt.Prailey met with Det.McDonald and Sgt.Fowler in the LWPd briefing room and viewed an ariel video tape taken by Det.McDonald. Upon viewing the video tape it was observed that there were a group of Boy scouts camping out near the area that was in question regarding the warrant. Lt.Prailey dispatched Sgt.Lyons to the area, (Camp Shuman) and had the scouts removed to a safe area.

At appx 17:00 hrs Sgt.Lyons reported back to Lt.Prailey that the area was clear and the scouts had infact been moved. At appx 17:15 hrs Sgt.Lyons along with a Boy Scout Master who knew the area, went to same to check out possible trails leading to the objective.

At appx 17:55 hrs Sgt.Lyons and Scout Master returned stating they had found a trail leading to the objective. Lt.Prailey then briefed the Tac Unit with this new information, plus the overall raid plan. The unit was given a final overall inspection for gear and weapons, plus their assignments. At 1800 hrs Judge Milliron arrived at LWPd and signed the warrant for Sgt.Fowler, NICU Supervisor.

At appx 18:45 hrs the Tac Unit departed the LWPd enroute to the objective. At appx 18:55 hrs the Unit arrived at Camp Schuman, where the vehicle was parked and the Unit began making its way to the objective through the woods.

At appx 19:20 hrs, the Unit arrived in the area of the objective. After placing the out-perimeter personnel, the unit then made its way closer to the objective. (House) at 8204 Cahoba Dr. Lt.Prailey then moved the unit into position to make entry, and dispatched the entry team to

a double sliding door. The door was found to be locked and blocked by furniture. Lt.Prailey advised Sgt.Wadkins to move the entry team around the opposite side of the house, where another double sliding door was located.

At this time the go signal was given by Lt.Prailey. As the entry team approached the double sliding door, Ofc.Tatsak and Johnson both hollered "Police" come out of the house. The Ofc's were met by two barking dogs, and no other response. Lt.Prailey was advised of the dogs. Lt.Prailey then instructed the entry team to open the door and make entry, but to be aware of the dogs, and in the event the dogs attempted to attack the Ofc's, the Ofc's would shoot the dogs, to prevent from being injured.

As Ofc.Tatsak pulled the sliding glass door back, a large brown German shepard came forth and lunged at Ofc.Tatsak, who jumped back. The dog then continued his charge towards Sgt.Wadkins. The animal was shot at this time. At the team entered the premises, Ofc.Tatsak attempted to make entry into the bedroom. As Ofc.Tatsak opened the door, a large Doberman came charging forth across a bed. It was necessary to shoot the animal at this time.

A final sweep of the house was made, and determined clear. Lt.Prailey then contacted Sgt. Fowler by hand radio and advised Sgt.Fowler that NICU personnel could now assume responsibility for the premises. Time was appx 1952 hrs.

Upon the arrival of the NICU personnel at the house, Lt.Prailey then removed the TAC Unit from the area, and returned to the LWPd. Upon arrival at the P.D. Lt.Prailey

and Sgt. Wadkins conducted a de-briefing of the raid, which is Dept. SOP.

PLAN: The basic plan was to approach the house through the wooded area and position the team as close as possible, before making entry.

OPERATION: To secure the premises for NICU personnel based on their warrant.

ARREST: YES NO

CASUALTIES: OFFICER ACTOR HOSTAGE OTHER  
(Two Dogs) One Doberman, One German Shepard.

DETAILS: Ref: To Situation for complete details.

CRITIQUE: Conducted by Lt.Prailey and Sgt.Wadkins at LWPd upon completing the operation. Raid considered sucessful under the circumstances.

Lt.J.R.Prailey Sr  
TAC Commander  
Lake Worth Police Dept.

cc. Chief.B.C.Campbell  
cc. Capt.S.C.Sosa  
cc. NICU



## EXHIBIT C

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN and §  
KENNETH LEATHERMAN, §  
Individually and as Friends of §  
TRAVIS LEATHERMAN; §  
GERALD ANDERT; KEVIN §  
LEALOS and JERRI LEALOS, §  
Individually and as Next Friends §  
of SHANE LEALOS and TRAVOR §  
LEALOS; PAT LEALOS; DONALD §  
ANDERT; and LUCY ANDERT, §

Plaintiffs §

vs. §

THE TARRANT COUNTY §  
NARCOTICS INTELLIGENCE §  
AND COORDINATION UNIT; §  
TIM CURRY, in his Official §  
Capacity as Director of the §  
Tarrant County Narcotics §  
Intelligence and Coordination §  
Unit; TARRANT COUNTY, §  
TEXAS; DON CARPENTER, in his §  
Official Capacity as Sheriff of §  
Tarrant County, Texas; CITY OF §  
LAKE WORTH, TEXAS; and CITY §  
OF GRAPEVINE, TEXAS, §

Defendants §

CIVIL ACTION  
NUMBER  
CA4-89-842-K

AFFIDAVIT OF ART VAN DORN

THE STATE OF TEXAS §  
§  
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared ART VAN DORN, who by me having been duly sworn made the following affidavit:

My name is Art Van Dorn. I am above the age of 21 years, fully competent to make this affidavit, and have personal knowledge of the matters of material fact hereinafter set forth, which are true and correct.

I am the Director of the Tarrant County Narcotics Intelligence and Coordination Unit (N.I.C.U.). I am custodian of the records, and they are maintained under my supervision and control.

Attached hereto as Attachments 1, 2, 3 and 4 are true copies of the reports of Detectives Hart, Marler, Brainard and Duff concerning the search of the premises at 2858 North Kimball Road in Southlake, Texas, on January 30, 1989. These reports were made by law enforcement officers in the regular course of their duties to report matters which they are required by law to observe and report.

Attached hereto as Attachments 5, 6 and 7 are true copies of the Search and Arrest Affidavit, the Search and Arrest Warrant and the Return concerning the search of the premises at 2858 North Kimball Road in Southlake, Texas, on January 30, 1989.

Attached hereto as Attachments 8 and 9 are the reports of Officers Brewley and Fergus of the Southlake Police Department concerning the search of the premises at 2858 North Kimball Road in Southlake, Texas, on January 30, 1989. These reports were made by law enforcement officers in the regular course of their duties to report matters which they are required by law to observe and report.

Attached hereto as Attachments 10 and 11 are true copies of the reports of Roney Testerman, Southlake Fire Department, FF/EMT, concerning the party injured in the search of the premises at 2858 North Kimball Road in Southlake, Texas, on January 30, 1989.

Attached hereto as Attachment 12 is a true copy of the report of Corporal Traweck of the Grapevine Police Department. This report was made by a law enforcement officer in the regular course of his duties to report matters which he is required by law to observe and report.

Attachments 1 through 12 are records kept or received in the regular course of business of the N.I.C.U. They were prepared at or near the time of the fact or event recorded by persons having actual knowledge thereof and it is the regular course of business of the N.I.C.U. to keep and receive such records.

Further, affiant sayeth not.

/s/ Art Van Dorn  
ART VAN DORN

THE STATE OF TEXAS       §  
  §  
COUNTY OF TARRANT     §

SWORN to and subscribed before me by the said ART VAN DORN on this the 11th day of APRIL, 1990.

(Seal)

/s/ Karen Brock  
Notary Public in and for  
the State of Texas

/s/ Karen Brock  
Notary's Printed Name  
My commission expires: 10-5-92

#### EXHIBIT C

On January 30, 1989, 10:00 a.m. I, Sgt. R.W. Hart and Officer Tim Stewart answered a Signal 8 (audible alarm) at 2500 North Kimball, the Meeks residence. Upon arrival I parked my patrol unit in front of the residence and as I exited my vehicle I smelled a very strong odor of phenacetic acid and ether. Due to my extensive training as a narcotic investigator at Texas Department of Public Safety Academy I knew these odors to be associated with a clandestine amphetamine lab. At this time I told Officer Stewart to meet with me at the front of the residence, near my patrol unit. As Stewart approached my patrol unit he got a strange look on his face and stated "Do you smell what I smell?" I told Officer Stewart that in my opinion we had a cooking drug lab at this residence or

the residence just south of our location. At this time I contacted the dispatcher and requested that she have Detective Marler meet with me at my location. Det. Marler arrived and as he was exiting his vehicle he got a good strong smell of the cooking chemicals. After Det. Marler arrived and we determined that the house and shop were not occupied, he contacted Sgt. Larry Traywick of the Tarrant County Narcotic Task Force and requested their assistance at our location. Upon their arrival the Task Force members got a good strong smell of the cooking chemicals and determined that there was in fact a cooking drug lab in the immediate area. After checking the residence and shop the Task Force members advised us that the drug lab was not at our location. At this time the Task Force members and Det. Marler went into a heavily wooded area behind the residence in an attempt to locate the drug lab, but as they moved away from the residence the smell decreased. At this point the Task Force pinpointed their investigation on the area of 2058 N. Kimball. As they were checking the south side of the residence they found the smell got stronger the closer they got to the residence located at 2050 N. Kimball. 2050 N. Kimball is the next house south of 2500 N. Kimball.

Task Force members determined that odors of the drug lab were coming from the residence or one of the many old ambulances or vans parked near the residence located at 2050 N. Kimball. Task Force members were unable to check the residence or vehicles more closely due to several white male subjects roaming around the yard and the vicious attack dog in the yard.

At this point the Task Force members and SLPD officers left the area. Sgt. Traywick advised Det. Marler that there

was probable cause to begin gathering information so a search warrant could be obtained. Det. Marler checked water records through the Southlake Water Department. Their records revealed that water consumption at 2058 N. Kimball had risen from 13,000 gallons in December 1988 to 17,000 in January 1989. Several license plate numbers had been recorded from vehicles that were parked at 2058 N. Kimball. The owners of the vehicles were identified. The post office in Grapevine was contacted and advised that persons by the last name of McKee and Lealos were receiving mail at 2058 N. Kimball. Criminal history checks were run on these subjects, the checks revealed that one of the subjects had been heavily involved in criminal activity. All information was passed on to the Drug Task Force. At approximately 3:00 p.m. Det. Marler was contacted by Sgt. Traywick and he advised that they were writing a search warrant for 2058 N. Kimball in Southlake. When Det. Marler advised me of this I had Records Clerk Daisy Neathery contact the Hilton Hotel in Killeen and leave a message for Chief Campbell to contact me as soon as possible so I could advise him of the situation. I also telephoned the third in command, Sgt. K. Allman, and advised him of the situation. Sgt. Allman stated that he was just walking out the door to go to college and would not be able to assist in executing the warrant. At approximately 6:00 p.m. Sgt. Traywick contacted Det. Marler and advised that the search warrant was written and they would be enroute to Grapevine to get the document signed. At this point I contacted City Manager Curtis Hawk and met with him in my office. I advised Mr. Hawk of the complete situation and requested his permission to use Grapevine PD Tact Team



for entry into the residence. Mr. Hawk gave his permission to proceed with the raid. I advised Mr. Hawk that I wanted to have the SLPD ambulance and one fire engine standing by while the search warrant was being executed. I further advised Mr. Hawk that the Task Force had agreed to take possession of all drugs, monies, and property that needed to be confiscated but that our department would be responsible for removing any hazardous chemicals. I advised Mr. Hawk that Western Emergency Services in Roanoke would handle that task. Mr. Hawk agreed to use them, if needed. I also told Mr. Hawk that chemist, Max Courtney, had been put on standby by the Task Force. Mr. Hawk thanked me for advising him of the situation and gave me full permission to proceed with the raid.

At this time myself and Det. Marler met with Assistant Fire Chief David Barnes at his residence and advised him of the situation and requested that he have personnel standing by. Chief Barnes agreed and stated that he would assist in any manner needed.

At 6:30 p.m. myself and Det. Marler met with the Task Force members and GVPD Tact Team leader, Captain Dale Wilkins, at the Grapevine Police Department. Capt. Wilkins advised that the area had already been scouted and the assault plan was made. Det. Marler stayed with Captain Wilkins while he briefed the Tact Team. I returned to the Southlake Police station and telephoned Reserve Officer Richard Anderson and Officer Barry Hinkle and requested that they come in to assist in the raid. I met with Officers Anderson, Hinkle, Morgan and Gregg and advised that when we were notified by Det.

Marler that GVPD was in position to hit the house, Officer Morgan would stop all traffic north bound on Kimball from Dove Road. Myself and Officer Anderson, in unit 232, and Officers Hinkle and Gregg, in unit 230, would drive to the house and remain outside the fence on the south side of the residence until the Tact Team had made entry and secured the residence. At this time I advised the fire department to station the ambulance and fire engine in the parking lot of Yates Grocery located at Dove Road and North Kimball. This parking lot is 2 blocks south of 2058 N. Kimball. Units 230 and 232 were parked at the intersection of Dove and Kimball as the GVPD van passed north bound on Kimball Road. Both SLPD patrol units waited until Det. Marler called us to move in. At this time both units drove to 2058 N. Kimball, exited our patrol units and waited outside the fence until we were notified by the Tact Team that the house was secure.

As the Tact Team was entering the house it was clearly heard that they were screaming "Police, Police, Police, Police, on the ground, Police, face down on the ground." At this time I heard several vehicles moving toward my location and I looked behind me to see the SLPD ambulance and fire engine were now stationed approximately 200 yards south of the residence.

At this point Det. Marler advised the house was secure and as SLPD personnel were climbing over the fence a GVPD Tact Team officer came out of the front door and stated "Southlake, we need an ambulance". At this time I contacted SLPD Assistant Chief Barnes by radio and stated "232 to C-2 I need your ambulance down here now". The dispatcher stated "Do I need to tone them out?" I stated "No, they are standing by". By the time I

got over the fence and ran to the house the SLPD ambulance was in front of the house. At this time I entered the residence through the front door and a GVPD Tact officer pointed to a white male who was on his knees with his hand raised. The subject had some type of scalp wound. As I approached the white male with the injury he was being guarded by a GVPD Tact Team member who was standing behind a black four foot tall bullet proof body shield. On the front of the shield, facing away from the officer's body, the word Police is clearly written in large white letters. The Tact officer was dressed in standard black SWAT team coveralls with Grapevine Police written on the left shirt pocket area in bright red letters. The coveralls also have red Grapevine Police patches on both sleeves near the shoulder area. As I approached the injured person he appeared to have a minor scalp injury. At this time I hand cuffed the white male and led him outside to waiting medical attendants. Asst. Fire Chief Barnes was assisting the ambulance attendants. As I was leaving the ambulance a GVPD Tact Team member requested that I take control of a subject they had detained in the front yard. I exchanged handcuffs on the subject and Officer Morgan arrived. This subject was placed in patrol unit 231. This subject was violent and kept stating "I'm going to sue you Mother Fuckers."

At this time I returned to the house and the Task Force members were making a walk through search of the house. At this point two females and two teenagers were sitting on the couch in the living room. One of the females was handcuffed. Due to several guns in the room, I had these subjects to stand up and Officer Hinkle checked under the couch cushions. After finding no

weapons, I had Officer Hinkle to uncuff the female. This female asked if her grandmother could join them on the couch in the living room. I escorted the female to the den and she asked an older white female to join them in the living room, the older female refused. I escorted this subject back to the living. At this point the white female asked "Would you tell me what's going on?" I advised that the Task Force members would speak to her shortly. At this time Sgt. Traywick and Det. Duff escorted a white female to the master bedroom and explained why the Tact Team had entered the residence and why the other officers were in the house. When Traywick and Duff returned they took Kevin Lealos to the bedroom and explained why a search warrant was being executed at his residence. This officer was later informed, by a Task Force member, that Kevin Lealos told Sgt. Traywick that he knew why we were there and it was because he had loaned his blue van to a friend and the friend had taken the van to Euless and cooked some chemicals in it. Sgt. Traywick then asked Lealos what he meant by cooking some chemicals and Lealos stated "That's all I've got to say."

At this time I went outside to check on the injured person. Upon arrival I was met by Asst. Fire Chief David Barnes. Chief Barnes advised that the white male inside the ambulance had refused treatment for a minor scalp wound and had refused further treatment and also refused to be transported to the hospital. I un-handcuffed this subject and he stated "We are going to sue you bastards". Paramedic, Ron Testerman, asked the white male to sign a standard form refusing transportation to the hospital, the white male stated "Fuck you, I'm not



going to sign a Goddamm thing". This statement was made in the presence of Asst. Chief Barnes, EMT Brenda Barnes, Det. Marler and myself. At this point the white male entered the residence and started telling police officers to get out of his house and at one point he grabbed SLPD Reserve Sgt. Richard Anderson grabbed the white male's hand, pushed him away and told him to back off. At this point a female stepped between Sgt. Anderson and the violent white male. At this time Officer Hinkle requested assistance from other SLPD officers due to other persons in the residence starting to get violent. Det. Marler, Officer Gregg, Officer Morgan and myself went back into the residence and attempted to calm the residents. It was apparent that the longer we were at the residence the more problems we would have. At this time I advised the people in the house that if they had any questions to contact Chief Campbell. At this time all officers cleared the scene without any further problems.

---

EXHIBIT C  
Att 2

On January 30, 1989 at approximately 10:10 a.m. Sgt. R. W. Hart #1119 requested that I meet with him at 2500 N. Kimball. When I arrived at 2500 N. Kimball, Southlake Texas I pulled up to a circle graveled driveway in front of the residence. As I exited my vehicle I smelled a very strong odor of P2P. I spoke with Sgt. Hart and Officer Tim Stewart who both smelled the very strong chemical odor. Sgt. Hart advised that he and Officer Stewart had been dispatched to 2500 N. Kimball on an audible alarm (sig.

8) call. When they arrived on the scene he and Officer Stewart had smelled the strong chemical odor. Recognizing this odor to be P2P substance, used in the cooking of amphetamine, they notified me. Sgt. Hart and I checked the residence at 2500 N. Kimball and found it to be secure including the workshop. Both myself and Sgt. Hart continued to smell the P2P order. I then went to Sgt. Hart's patrol unit which is equipped with a mobile telephone and called the Northeast Sector of the Tarrant County Drug Task Force where I spoke with Larry Traywick. I advised Traywick of the odor and requested he come to our location because I believed there was an amphetamine lab in the residence of 2500 N. Kimball or a residence to the south. I checked the direction of the wind and found it to be coming from the south, southwest. Sgt. Traywick and his partner arrived approximately 10-15 minutes later and pulled their vehicle directly behind mine. As Traywick exited his vehicle he smelled the strong odor of P2P. The Task Force members checked the residence and workshop and determined that the amphetamine lab was not in the residence of 2500 N. Kimball. I then walked with Traywick and his partner into a wooded area south of 2500 N. Kimball. Directly south of the residence the chemical odor was very strong. The further east we walked the less we could smell the chemical odor. The house at 2500 N. Kimball and the others in the area are on a hill and their back yards slope down to a creek. In the low areas there was an odor of P2P.

There are two houses south of 2500 N. Kimball, the McKee residence at 2058 N. Kimball and the Paul M. Shia residence which is directly behind 2058 N. Kimball. The



Task Force members walked around close to these houses and determined that the odor was coming from 2058 N. Kimball. Sgt. Traywick, his partner and I walked down Kimball Road right in front of the residence. At the northeast corner of the property we again smelled the odor of P2P. The wind was still blowing from the south-southwest. We were walking from the south of the residence and until we got to the northeast corner of the property we could not smell anything. As we left the area we obtained a license plate number of a vehicle parked in front of the residence at 2058 N. Kimball. The license plate number Sgt. Hart obtained was Texas 2683GH. At SLPD I had the Court Clerk run the license plate 2683GH through her computer to see if anyone in that vehicle had ever been issued a citation in Southlake. The Court Clerk advised that a Jeffrie D. McKee, W/M DOB 08-28-50 who resides at 2802 Tumbleweed in Grapevine had been issued a citation for No Proof of Insurance on 05-28-88. I then had the Southlake Water Dept. employee pull the file for 2058 N. Kimball. I learned that the water was in the name of Deborah McKee and that in January of 1989 they had used 17,270 gallons of water. I checked this amount of water to the amounts of water they used in the past and the records revealed the use was: August, 1988 20,820, Sept. 13,120, Oct. 10,940, Nov. 12,810, and Dec. 13,570. I added these figures up and divided them by the number of months involved and their annual monthly average water at 10,088 gallons for the past five months. In January 1989 they used 17,270 gallons. I then had Sgt. Hart call the Grapevine Post Office to see who was receiving mail at 2058 N. Kimball. The Post Office advised Sgt. Hart of three last names for the residence:

Andert, McKee and Lealos. I then had these last names checked against offense cards in Dispatch where I discovered that a Kevin Scott Lealos W/M DOB 09-19-53 had reported a theft \$750/20,000 in 1986. Lealos' address at that time was 2058 N. Kimball. I then had the dispatcher run a criminal history on the subject Lealos. Lealos had the following arrests: one burglary w/no convictions: one theft/larceny w/one conviction: one forgery w/one conviction; one weapons charge w/no conviction; 2 DWI w/no convictions. Lealos' last arrest was 12/16/88 for Burglary with Irving PD. I then went back to the area and spoke with Thomas Walker of 2050 N. Kimball. I told Mr. Walker we had some complaints of an obnoxious odor in the area. Mr. Walker advised that he had smelled the odor before and that he believed it was coming from either 2058 N. Kimball or the house behind it (the Shia residence). At approximately 1400 hours Officer Tim Stewart stopped a vehicle on a traffic violation. The vehicle stopped was a 1988 GMC P/U bearing Texas lic. plate 2683GH. The driver of the vehicle was Deborah Lynn McKee W/F DOB 09-29-50 who resides at 2802 Tumbleweed in Grapevine. I then drove by 2802 Tumbleweed in Grapevine and observed a 1981 Cadillac 2 dr. parked in front of the residence. The registration on the vehicle returned to Deborah McKee of 2802 Tumbleweed. I then returned to SLPD and advised Sgt. Traywick of the above information. Traywick advised me that a search warrant was being prepared for the residence at 2058 N. Kimball.

Sgt. Hart and I then returned to the area and walked behind several houses and could not detect any chemical odor. The houses were south of 2058 N. Kimball from 1790 N. Kimball to 2050 N. Kimball. Sgt. Hart and I then

drove to Les and Joy Gibson's house at 2800 N. Kimball where we spoke with Mrs. Gibson. Mrs. Gibson advised us that she smelled a strong odor about two or three times a month when the wind was blowing out of a certain direction. The smell was so bad that she had her septic tank pumped thinking it was sewer gas. About 10 yards south of the Gibson house we could smell the odor of P2P. Gibson also advised us that when she had to pick up a UPS package at the Shia residence that the odor was very strong outside but she did not smell anything inside the residence. Mrs. Gibson allowed us on her property and as we walked south toward 2500 N. Kimball and 2058 N. Kimball the smell of P2P got stronger.

At approximately 6:00-6:15 p.m., I went to GVPD to meet with Capt. Wilkins and Sgt. Traywick. Sgt. Traywick had a search warrant issued for 2058 N. Kimball and we planned the raid on the residence. The Grapevine Tact Team was dressed in black overalls with Grapevine Police Tactical in red letters on their shoulders and Grapevine Police Department Tactical on the left breast pocket. The Tact Team was briefed and then they went to the staging area on Dove Road at the fire station. While they were going over final briefing I telephoned Thomas W. Walker at 2050 N. Kimball and informed him that a search warrant was going to be executed around his residence and requested that he leave the area which he agreed to do. I then drove to the Shia residence and advised him that a search warrant was going to be executed in the area and that if he didn't leave the house to stay in the house until it was over. I did not smell any P2P coming from inside the house. I then returned to the staging area. Final plans were made and I got into the Grapevine Police Dept. van

along with the Tactical Team and we proceeded to go to 2058 N. Kimball. We pulled into the gravel driveway on the south side of the residence. The van stopped and the Tactical Team exited the van. I heard officers scream "Police, get down on the ground". I heard the back door being forced open and I again heard "Police, get on the floor". I then exited the van and walked to Capt. Wilkins' vehicle which was parked right behind the van. As I was talking to Capt. Wilkins the Tact Team, inside the residence, requested an ambulance. I got on my portable radio and requested an ambulance. I then ran approximately 100 yards to the front gate on the north east side where I stopped the ambulance and opened said gate. Sgt. Hart came out of the house with a white male that had a slight cut on his forehead. Sgt. Hart transported him to the ambulance. I then entered the residence with members of the Narcotics Task Force. Inside we observed several people (I believe 6 or 7) inside. All persons were sitting either on couches or chairs. We walked through the house and did not find a drug lab. I then went back outside where I heard the man with the cut on his forehead refuse to sign a treatment refusal form. The man then became very belligerent toward all officers. I heard him say that he could "whip any two officers" and that if his oldest son had been there he would have "killed everyone there" because his son was the "toughest Son of a Bitch around" and he was "just as tough". The white male with the cut continued to be very belligerent. The Task Force members also spoke with the owners of the residence to advise them of why they were there.

I then went outside in the driveway where I spoke with Donald Andert (identified in the newspapers). I told



Andert why we were there and he sniffed the air and smelled the P2P but stated that he did not know anything about amphetamine. Donald Andert then told me that he thought we were there because of all the cars and that we thought they were "cutting cars". Donald Andert then seemed to calm down and he went back to work on his car. I then went outside the fence and waited for the Task Force members to finish. We then left the area and returned to SLPD. The raid started at approximately 1945-2000 hours and all officers cleared approximately 2110-2120 hours.

Det. Jeff Marler #1108

EXHIBIT C  
Att 3

Tarrant County Narcotics Intelligence  
and Coordination Unit

NORTHEAST SECTOR

SUPPLEMENT REPORT

Number: 89-036-NE Date Reported: 1-30-89

Location: 2058 Kimball, Southlake, Texas

Officer: BRAINARD I.D.: #108

Supervisor: \_\_\_\_\_ I.D. \_\_\_\_\_

Page 1 of 1

On Monday, January 30, 1989, at approximately 11:00 a.m., I was called by Det. J. Marler, Southlake Police

Department, who stated that he was at a residence on Kimball Road, in Southlake, Texas, on a burglar alarm, and he was smelling a strong odor that he associated with the illicit manufacturing of Amphetamine. Marler had requested assistance from the Task Force in identifying the source of the odor.

Myself and L. Traweck, also of the NE Task Force, responded to Marler's location on Kimball Road, and immediately upon exiting our vehicle I smelled a strong odor. While walking around in the area, we determined the odor was originating from 2058 Kimball Road. The odor was not present on the South side of the residence, and as we approached the North side of the residence the odor was extremely prevalent. The wind was from the South, blowing North. The strongest area of the odor seemed to be emitting from the garage/driveway area of the premises.

Traweck and I returned to the Task Force Offices, discussed the situation, and Det. Duff prepared a Search Warrant for the premises based on our information and at the request of Det. Marler.

Entry onto the premises was conducted later by the Grapevine Tactical Unit, and I remained outside the residence where I assisted in the search. No functioning laboratory was found as predicted, nor any equipment used in the manufacturing of Amphetamine. However, I did detect a slight odor of Phenyl-Acetic Acid and ether in the driveway area. No further action was taken by this office.



## EXHIBIT C

## Att 4

Tarrant County Narcotics Intelligence  
and Coordination Unit

## NORTHEAST SECTOR

## Incident REPORT

1. Offense search warrant
2. Case Number 89-036-NE
3. Location Of Offense 2058 N. Kimball Rd. Southlake
4. Complainant's Name/Address TCNICU-NE
5. Date/Time Of Occurrence 1-30-89 / 8:00 pm
6. Reporting Officer/I.D. Number M.W. Duff 105
7. Date Of This Report 1-30-89
8. Approving Supervisor T. O'Connell #101

## 9. Suspect Information

Name	R/S	D.O.B.	Address
1. Kevin Scott Lealos	WM	9-10-53	2058 N. Kimball Rd. Southlake
2. _____	_____	_____	_____
3. _____	_____	_____	_____

## 10. Seizure Attached To This Offense?

( ) Yes (X) No

## 11. Elements Establishing The Offense

On 1-30-89 at about 11:00 pm Detective Brainard was contacted by Detective Marler with the Southlake police in reference to a possible clandestine amphetamine lab. Marler advised that while conducting a burglary investigation on N. Kimball Rd., Southlake officers detected an order that they believed to be an amphetamine lab. Marler contacted Narcotics Task Force Officer Brainard who contacted Task Force Officer Traweck. Both went to the location in Southlake and as described in the Search Warrant affidavit that was later prepared, isolated the odor to the suspected place, 2058 N. Kimball Rd. Southlake, and positively identified the odor as an amphetamine lab. Investigation was conducted to identify the residents and a search warrant was prepared. During its preparation, Marler advised that he had checked again and that he was certain that the odor was coming from this house. The warrant was presented to Judge Boring and signed. A briefing was held at Grapevine PD on the execution of the Search Warrant. There is an agreement between Southlake PD and Grapevine PD, that Grapevine's Tactical Team is utilized for Southlake when needed. During the tactical planning for the execution of the Search Warrant, neighbors were contacted and advised that they should evacuate their homes due to the potential hazards of a clandestine lab. During this contact, one of the neighbors reported that they had observed a lot of suspicious activity at that residence, primarily at night. Additionally a neighbor reported detecting a strong unusual odor from that residence that they could not identify. These neighbor contacts were intentionally not made earlier in the investigation, due to the possibility that neighbors could warn suspects of a

police investigation and jeopardize the case. The neighbors were contacted just prior to entry for safety reasons. At about 8:00 pm, the Grapevine Tactical Team made entry into the residence. Task Force members Duff, Traweek, Brainard, and Hargrove waited about a block away until the location was secured, and the search could be conducted. We were able to hear the officers yelling "Police" numerous times, but from our location we could not see the activity at the house. An ambulance was requested for an injured person at the scene. After the residence was secured, Task Force members entered the residence to conduct a search. Upon arrival inside the residence there was a great deal of confusion and the residents were very upset and uncooperative towards the tactical officers and the patrol officers. A quick preliminary search by Duff and Traweek revealed that there was no lab, no odor within the house, nor any chemicals or equipment associated with manufacturing. Mrs. McKee was located and taken aside. Traweek and Duff attempted to explain what was occurring to her. From the backroom we were in we heard another outburst of noise from the living room area and found that Kevin Lealos had entered the house and was very irate. We contacted him, took him aside and attempted to calm him down and answer his questions. He kept asking if this Search Warrant was a result of his van being parked outside. When asked what he was talking about, Lealos advised that he let someone borrow the van, and learned that it was used to 'haul some stuff' and that it was involved in an incident in Euless. He became very secretive about this issue and refused to talk further about the van, although he brought it up several times. It was learned that a 62 year old male at the location was injured during the entry by

an officer. No Task Force persons witnessed any of this. The older male was very hostile and irate even after everyone else had calmed down. He continually made threats to officers and stated that he would kill the officer who hit him. The subject advised that he fought with the officers when they made entry because he did not know who they were. The gentleman and family advised that they thought they were Monster. The resident that reported seeing suspicious activity at the residence was Mr. Cisco who lives at 2819 Cliffside, Grapevine, TX. phone (817) 488-9349.

---

EXHIBIT C  
Att 5

STATE OF TEXAS )

SEARCH AND ARREST  
AFFIDAVIT

COUNTY OF TARRANT )

THE UNDERSIGNED AFFIANT, BEING A PEACE OFFICER UNDER THE LAWS OF TEXAS, AND BEING DULY SWORN ON OATH, MAKES THE FOLLOWING STATEMENTS AND ACCUSATIONS:

1. THERE IS IN TARRANT COUNTY, A SUSPECTED PLACE AND PREMISES, LOCATED AS FOLLOWS:

A RESIDENCE KNOWN AS 2058 KIMBALL RD. SOUTHLAKE, TARRANT COUNTY TEXAS. THE RESIDENCE IS FURTHER DESCRIBED AS BEING A SINGLE STORY SINGLE FAMILY DWELLING OUTWARDLY CONSTRUCTED OF BRICK THAT IS TAN IN COLOR, WITH A BROWN ROOF. THE FRONT DOOR IS RED IN COLOR AND FACES TO THE EAST. THERE IS A GARAGE ON THE NORTH EAST END OF THE HOUSE WITH DOUBLE DOORS. THERE IS A BLACK MAIL BOX AT THE FRONT OF THE PROPERTY BY THE STREET WITH THE NUMBERS '2058' ON IT IN GOLD.

2. THERE IS, AT SAID SUSPECTED PLACE AND PREMISES, PROPERTY CONCEALED AND KEPT IN VIOLATION OF THE LAWS OF THE STATE OF TEXAS, AND DESCRIBED AS FOLLOWS:

CONTROLLED SUBSTANCES AND CHEMICALS USED TO MANUFACTURE CONTROLLED SUBSTANCES, NAMELY AMPHETAMINES / METHAMPHETAMINES AND THOSE CHEMICALS USED IN THE MANUFACTURE OF AMPHETAMINES. LABORATORY GLASS WARE AND OTHER EQUIPMENT USED IN THE MANUFACTURING PROCESS.

3. SAID SUSPECTED PLACE AND PREMISES ARE IN THE CHARGE AND CONTROL OF EACH OF THE FOLLOWING PERSONS:

DEBORAK McKEE, A WHITE FEMALE  
JEFFEREY D. McKEE, A WHITE MALE, 8-28-50  
KEVIN SCOTT LEALOS, A WHITE MALE, 9-10-53

4. IT IS THE BELIEF OF THE AFFIANT, AND HEREBY CHARGES AND ACCUSES THAT:

SUSPECTS ARE IN POSSESSION OF CONTROLLED SUBSTANCES, CHEMICALS AND EQUIPMENT USED TO MANUFACTURE CONTROLLED SUBSTANCES. SUSPECTS ARE MANUFACTURING CONTROLLED SUBSTANCES.

5. AFFIANT HAS PROBABLE CAUSE FOR SAID BELIEF, BY REASONS OF THE FOLLOWING FACTS AND INFORMATION:

A. YOUR AFFIANT, M.W. DUFF IS A PEACE OFFICER FOR THE CITY OF EULESS AND HAS BEEN FOR OVER FIVE YEARS. YOUR AFFIANT HAS BEEN A NARCOTICS INVESTIGATOR SINCE JANUARY 1987, AND HAS BEEN ASSIGNED TO THE TARRANT COUNTY NARCOTICS TASK FORCE SINCE JANUARY, 1988.

B. YOUR AFFIANT WAS CONTACTED BY DETECTIVES TRAWEEK AND BRAINARD, WHO ARE ALSO ASSIGNED TO THE TARRANT COUNTY NARCOTICS TASK FORCE, ON THIS DATE REGARDING NARCOTICS INFORMATION.

C. BRAINARD AND TRAWEEK RECEIVED INFORMATION ON THIS DATE FROM DETECTIVE MARLER WITH THE SOUTHLAKE POLICE DEPARTMENT ABOUT A RESIDENCE KNOWN AS 2058 N. KIMBALL RD. IN SOUTHLAKE TEXAS. MARLER ADVISED THAT WHILE IN THE AREA OF THIS RESIDENCE ON AN UNRELATED POLICE MATTER, HE DETECTED THE ODOR OF AN AMPHETAMINE LABORATORY IN THE AREA. MARLER IS FAMILIAR WITH THE ODORS ASSOCIATED WITH THE MANUFACTURING OF AMPHETAMINES. MARLER RELAYED THIS INFORMATION TO DETECTIVE BRAINARD.



D. BRAINARD AND TRAWEEK WENT TO THE AREA TO ATTEMPT TO LOCATE THE SOURCE OF THE ODOR AND TO IDENTIFY THE ODOR. BOTH INVESTIGATORS WERE ABLE TO POSITIVELY IDENTIFY THE ODOR AS THE ODOR THAT THEY RECOGNIZED IN LIGHT OF THEIR EXPERIENCE AS NARCOTICS INVESTIGATORS AS THE ODORS GIVEN OFF BY A CLANDESTINE AMPHETAMINE LABORATORY. BOTH TRAWEEK AND BRAINARD POSITIVELY IDENTIFIED THE SUSPECTED PLACE NAMED ABOVE AS THE SOURCE OF THE ODORS.

E. TRAWEEK AND BRAINARD HAVE BOTH BEEN PRESENT ON SEVERAL OCCASIONS WHEN WARRANTS WERE EXECUTED ON OPERATING AMPHETAMINE LABORATORIES.

F. WATER RECORDS SHOW THAT THE SERVICE AT THE SUSPECTED PLACE IS IN THE NAME OF DEBORAH MCKEE.

G. A BLACK PICK UP BEARING TEXAS LICENSE 2683GH WAS SEEN IN THE FRONT YARD AND A BLUE VAN BEARING TEXAS LICENSE 9973RG WAS SEEN INSIDE THE FENCED AREA. THE BLACK PICK UP RETURNS TO JEFFEREY MCKEE AND THE VAN RETURNS TO KEVIN SCOTT LEALOS.

H. LEALOS SHOWS TO HAVE A CRIMINAL HISTORY WITH FIVE ARRESTS, INCLUDING WEAPONS, THEFT, AND BURGLARY. JEFFEREY MCKEE WAS IDENTIFIED BY TEXAS D.L. 02781670.

WITNESS MY SIGNATURE THIS THE 30TH DAY OF JANUARY, 1989, AT 4:35 O'CLOCK PM. 1989.

/s/ Michael Duff  
AFFIANT

SUBSCRIBED, AND SWORN TO, BEFORE ME, ON THIS THE 30TH DAY OF JANUARY, 1989, AT 4:35 O'CLOCK PM.

/s/ Illegible  
MAGISTRATE IN AND FOR  
TARRANT COUNTY, TEXAS

EXHIBIT C  
Att 6

# SEARCH AND ARREST WARRANT

STATE OF TEXAS                    )  
  )  
COUNTY OF TARRANT            )

THE STATE OF TEXAS TO THE SHERIFF, OR ANY PEACE OFFICER OF TARRANT COUNTY, OR ANY PEACE OFFICER OF THE STATE OF TEXAS.

## GREETINGS:

Whereas, complaint, in writing, under oath has been made before me, by the Affiant, whose signature is affixed to the Affidavit, is a Peace Officer under the Laws of Texas, and said Affidavit is, by this reference incorporated herein for all purposes, and having stated facts and issuance of this warrant: You are therefore commanded to

forthwith search the place named therein, and described as the residence of; DEBORAH McKEE, JEFFREY McKEE 2058 N. KIMBALL RD. SOUTHLAKE, TEXAS,

including all other structures, and places on the premises, in the City of SOUTHLAKE, County of TARRANT, State of Texas, therein named and described where the said: CONTROLLED SUBSTANCE

To-wit: AMPHETAMINES, METHAMPHETAMINES CHEMICALS USED IN THE MANUFACTURING OF AMPHETAMINES AND METHAMPHETAMINES.

is alleged to be kept and concealed, and if you find that for which you are directed to search, you will seize and bring it before me. You will arrest and bring before me, each person described and accused, in said Affidavit:

DEBORAH McKEE, WHITE FEMALE,  
JEFFEREY D. McKEE, WHITE MALE, 8-28-50  
KEVIN SCOTT LEALOS, A WHITE MALE, 9-10-53

HEREIN, FAIL NOT, and due return make hereof to me, within three (3) days exclusive of the day of it's issuance, and the day of it's execution.

WITNESS my signature, this the, 30TH DAY OF JANUARY, 1989."

/s/ Illegible  
MAGISTRATE IN AND FOR  
TARRANT COUNTY, TEXAS

## EXHIBIT C

Att 7

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT  
SEARCH WARRANT RETURN

NUMBER: 89-036-NE

THE STATE OF TEXAS       )  
  )  
COUNTY OF TARRANT       )

CAME TO HAND ON THE 30th DAY OF January,  
1989, AT 4:35 O'CLOCK p.m.

EXECUTED ON THE 30th DAY OF January, 1989, AT  
8:10 O'CLOCK PM.

EXECUTED BY: M.W. Duff

LOCATION SEARCHED: 2058 N. Kimball Rd  
Southlake Texas

/s/ M. W. Duff  
OFFICER MAKING RETURN

## SEIZED ITEMS

No Items seized.

No Persons arrested.

/s/ Illegible  
Magistrate in and for Tarrant  
County, Texas

EXHIBIT C  
Att 8

(Logo)

Grapevine Police  
Department

SUPPLEMENTAL or CONTINUATION REPORT

Date

1-30-89

\* \* \*

On 1-30-89 at approximately 8:10 A.M. I was involved in a detail of the Grapevine Police Emergency Response Team. The detail involved securing the residence at 2058 Kimball Road for the purpose of search warrant execution authority of Southlake Police Department.

I entered the residence on the entry team. I was the second officer to enter. All officers that entered were wearing the Grapevine Police E.R.T. uniform and M.S.A. Air Packs due to the allegation that the location was an illicit drug lab. As I entered I shouted police officer to identify myself as such. I held my service revolver in my right hand and a department issued flashlight in my left hand. I first encountered a white male individual near a bar area attached to the kitchen. I shouted to the subject that I was a police officer and for him to lay down on the floor. I had my service revolver pointed at the subject. The subject did not lay down as directed but continually asked "who are you." I repeatedly over a period of several seconds, shouted "Police get down on the floor." The subject refused to do so and now advanced toward me closing a five yard distance to approximately two yards. I

backed up two or three steps and shouted once again, "Police get down." At this time the subject laughed and said, "What the fuck is this!" The subject then lunged toward me and with his left hand took hold of the barrel of my service revolver. At this point I feared the actor was indeed attempting to disarm me. I struck the actor with the flashlight striking him in the upper forehead. The actor released my revolver and fell to the floor. The individual remained on the floor and was taken into custody by a Southlake Officer.

I observed that the white male had sustained a laceration to his head during the struggle. I requested a paramedic be alerted outside to treat the individual.

Southlake Officers took charge of the scene at which time the E.R.T. unit left the scene.

Reporting Officer  
Bewley

I.D #  
339

EXHIBIT C  
Att 9

(Logo)

Grapevine Police  
Department

SUPPLEMENTAL or CONTINUATION REPORT

\* \* \*

On Monday 1-30-89 the E.R.T. team executed a search and arrest warrant for Southlake Police. Myself and Greg



Brewley were the first two subjects in the door after Hudson opened it. We immediately encountered 5 subjects in the kitchen area (2 W/M, 3 W/F) and one of the subjects was on the side of the Bar closest our entry point. We were all yelling "Police Get Down" and as we secured the subjects the older white male subject was approached by Brewley and was told to get down on the floor and the subject started to laugh at Brewley. He was again ordered to get down we were the police and he started toward Brewley. At this time the younger son started across the bar. The older subject grabbed Brewley's gun by the barrel at which time Brewley struck the older man to back him up. The younger son was approx  $\frac{1}{2}$  way over the bar when I stopped him by pointing my weapon in his face and screamed "Get back behind the bar and lay down on the floor." The subject did it and I followed him over the bar and secured him along with the three W/F's that were in the kitchen and at this time I was assisted by T. Smith. We secured the house, called for medical help for the older W/M and then left the house.

Reporting Officer  
D. Fergus

I.D.#  
334

---



EXHIBIT C  
Att 10

BEST AVAILABLE COPY

NO. 1 of 1 PATIENTS

1. INCIDENT NO. 787-0000
2. TIME OF ALARM 2013
3. DATE 1/30/99
4. ( ) FALSE ALARM ( ) WFO / TRANS
5. AMBULANCE DIST
6. MUTUAL AID

SECTION 1: PATIENT INFORMATION

1. Alarm Location: 2058 N. Kimball Apt. 1  
2. Patient Name: James Audelet DOB 9/29/24 Age 64 Race W M 1 FI  
3. Address: 2058 N. Kimball City/State SOUTH LAKE  
4. DL #  
5. Medical  
6. Responsible Party Address  
7. Place of Employment  
8. Responsible Party  
9. Relationship  
10. Physician  
11. Phone  
12. BSN/Medicare

SECTION 2: TIME/DISPATCH INFORMATION

8. Incident Time  
9. Call Received  
10. Amb. Dispatch  
11. Arrived Time  
12. Arrived Dest  
13. Return Svc  
14. Destination  
15. Physician  
16. Driver MTESERMAN  
17. Alt A. BARNES  
18. Other  
19. Fire ( ) Police ( ) On Scene

SECTION 3: MEDICAL HISTORY

20. Vital Signs BP 22/110 P 104 R 12 Time  
21. Known Allergies NO  
22. Medications NO  
23. LOC Con ( ) Semi ( ) Uncon ( ) RESP. Norm ( ) Labor ( ) ABS ( )  
24. Bleeding Non ( ) Min ( ) Mod ( ) Sev ( )  
25. Pain Non ( ) Min ( ) Mod ( ) Sev ( )

SECTION 4: LOCATION OF INJURY/ILLNESS

30. ( ) Head  
31. ( ) Face  
32. ( ) Eye R/L  
33. ( ) Neck  
34. ( ) Back  
35. ( ) Chest  
36. ( ) Abdomen  
37. ( ) Pelvis  
38. ( ) Upper Extrem R/L  
39. ( ) Lower Extrem R/L  
40. ( ) Cardiovascular  
41. ( ) Respiratory  
42. ( ) App Assault  
43. ( ) Breathing Diff  
44. ( ) Burn  
45. ( ) Diabetic  
46. ( ) Elec Shock  
47. ( ) Female Comp  
48. ( ) Head Attack  
49. ( ) Injured Person  
50. ( ) Maternity  
51. ( ) Med Emergency  
52. ( ) MVA  
53. ( ) Overdose  
54. ( ) Stab/Cutting  
55. ( ) Stroke  
56. ( ) Seizures  
57. ( ) Suicide (AM)  
58. ( ) Uncon Person  
59. ( ) Other

SECTION 5: TYPE OF INJURY/ILLNESS

60. ( ) Back Board  
61. ( ) C-Collar  
62. ( ) Control Bleed  
63. ( ) CPR  
64. ( ) Defib  
65. ( ) Destrosik  
66. ( ) EKG  
67. ( ) EOA Intub  
68. ( ) ET Intub  
69. ( ) IV  
70. ( ) MAST  
71. ( ) Medication  
72. ( ) OB Care  
73. ( ) Rotate TK  
74. ( ) Splinting  
75. ( ) Suction  
76. ( ) Oxygen  
77. ( ) Other  
78. ( ) Lasix  
79. ( ) Lidocaine 1%  
80. ( ) Lidocaine 4%  
81. ( ) Morphine  
82. ( ) Narcan  
83. ( ) Nitrous Oxide  
84. ( ) Nubaln  
85. ( ) Sodium Bicarb  
86. ( ) Valium  
87. ( ) Lasix  
88. ( ) Lidocaine 1%  
89. ( ) Lidocaine 4%  
90. ( ) Morphine  
91. ( ) Narcan  
92. ( ) Nitrous Oxide  
93. ( ) Nubaln  
94. ( ) Sodium Bicarb  
95. ( ) Valium  
96. ( ) Lasix  
97. ( ) Lidocaine 1%  
98. ( ) Lidocaine 4%  
99. ( ) Morphine  
100. ( ) Narcan  
101. ( ) Nitrous Oxide  
102. ( ) Nubaln  
103. ( ) Sodium Bicarb  
104. ( ) Valium

SECTION 6: DEFINITIVE CARE

78. Aminophylline  
79. Atropine  
80. Benadryl  
81. Bretylium  
82. Calcium CHL  
83. Decadron  
84. Dextrose 50%  
85. Dopamine  
86. Epl 1:1,000  
87. Epl 1:10,000  
88. Isuprel  
89. Lasix  
90. Lidocaine 1%  
91. Lidocaine 4%  
92. Morphine  
93. Narcan  
94. Nitrous Oxide  
95. Nubaln  
96. Sodium Bicarb  
97. Valium  
98. Lasix  
99. Lidocaine 1%  
100. Lidocaine 4%  
101. Morphine  
102. Narcan  
103. Nitrous Oxide  
104. Nubaln  
105. Sodium Bicarb  
106. Valium

SECTION 7: REMARKS

100. RTS Refused to Signly RTs was phoned Augerally the  
Released RTs Exposed treatment then Received Treatment  
and Thous Part

101. Physician or Nurse

Signature X Hospital X SGT Phil Alet #1119  
Yo me he negado ha aceptar transportation en ambulancia hoy  
I have refused an offer of ambulance transportation on this date 1/30/99  
Signature X Time 9:34  
Patient and/or Responsible Party refused to sign this refusal statement Date 1/30/99  
Signature X Time 9:34  
Signature of Attendant making offer Ray Testerman 302 FLEW

## EXHIBIT C

Att 11

DATE; 1/30/89

RUN#A89-019

PATIENT;  
JERRAL ANDERT  
NATURE; P.D.ASSIST

B.BARNS

R.TESTERMAN

Dispatched to a police standby at N.Kimball and Dove. Upon arrival found w/m walking from house at 2058 N. Kimball Pts had a small contusion with approx 1/4 in laceration to for head. Pts was assisted by police officer. Pts was in handcuffs. Pts only complaint was lac on forehead. Started treatment on pts, bandage forehead, took vitals. Police officer at this point released patient. Pts stripped bandage off as he left ambulance. Pts stated he refused treatment and was not signing anything. At this point cleared scene returned to station.

/s/ Roney Testerman 362  
RONEY TESTERMAN  
FF/EMT - P

---



EXHIBIT C  
Att 12

(Logo)

Grapevine Police  
Department

SUPPLEMENTAL or CONTINUATION REPORT

☒ Supplemental

☐ Continuation

Date

013089

Time

8:10 p.m.

Offense Reported  
Search and Arrest  
Warrant

Address Occurred  
2058 North Kimball,  
Southlake, Texas

Complainant  
State of Texas

Date of this report:  
020189

On Monday, January 30, 1989 at approximately 8:10 p.m., the Grapevine Emergency Response Team made entry at 2058 North Kimball Road at the request of Southlake Police Department for a narcotics search warrant prepared by the Tarrant County Narcotics Task Force. At approximately 8:15 p.m., Cpl. Traweck and Det. Duff entered the residence to check for any evidence. As I walked into the house a Southlake officer was guarding four (4) white females in a small room off to the left. An elderly lady was sitting on the couch in the livingroom with another Southlake officer in there. Myself and Det. Duff checked the house briefly for chemicals and lab equipment and found no evidence of such.

I asked the females in the front room who the owner of the house was. Mrs. Lealos stated she was the owner. Myself and Det. Duff talked with Mrs. Lealos explaining what was going on. While talking with Mrs. Lealos in the master bedroom for approximately five (5) minutes, we heard a commotion in the livingroom area. Mrs. Lealos stated that that was Kevin Lealos. We went into the livingroom and took Kevin Lealos back to the master bedroom and explained to him what was going on. Kevin made the statement, "I know what this is about, it's because of the van isn't it." When asked to explain, Kevin stated that he had loaned his van to someone and they had used it to boil some stuff in Euless and when he found out he went and got the van. When asked what they were boiling, Kevin stated, "I am not going to say anymore." When we walked back into the livingroom, an elderly man was ranting and raving about what had happened. Myself, Det. Duff, and Kevin were going out the back door to check the backyard. The elderly man started yelling, "Are one of you the asshole that hit me?" I explained to the man, who stated his name was Gerald Andert, that the entry team had left. Mr. Andert stated, "You get that little punk back here with the blood on his stick that hit me and I'll kill him myself." I advised Mr. Andert that he knew we were police officers at this point and that he really shouldn't make idol threats.

I asked Mr. Andert what happened. He told me that when they came in the house he thought they were monsters. Mr. Andert stated that he grabbed the first and was going to throw him out the door and that's when he was hit. Mr. Andert stated that didn't stop me, I still tried to put them out the door again.

At this point myself, Det. Duff, and Kevin checked the backyard for evidence and then the attic and found nothing. Checking in and around the house, we could not smell the P.A. smell except at the northeast corner of the front yard where the blue van was setting. Kevin stated several times while we were looking around that he knew that it had to be the van but refused to say anymore about it.

Reporting Officer	I.D.#
Cpl. Larry Traweck	#533

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN and	§	
KENNETH LEATHERMAN,	§	
Individually and as Friends of	§	
TRAVIS LEATHERMAN;	§	
GERALD ANDERT; KEVIN	§	
LEALOS and JERRI LEALOS,	§	
Individually and as Next	§	
Friends of SHANE LEALOS and	§	
TRAVOR LEALOS; PAT LEALOS;	§	
DONALD ANDERT; and	§	
LUCY ANDERT,	§	
Plaintiffs	§	CIVIL ACTION
vs.	§	NUMBER
	§	CA4-89-842-K
THE TARRANT COUNTY	§	
NARCOTICS INTELLIGENCE	§	
AND COORDINATION UNIT;	§	
TIM CURRY, in his Official	§	
Capacity as Director of the	§	
Tarrant County Narcotics	§	
Intelligence and Coordination	§	
Unit; TARRANT COUNTY, TEXAS;	§	
DON CARPENTER, in his Official	§	
Capacity as Sheriff of Tarrant	§	
County, Texas; CITY OF LAKE	§	
WORTH, TEXAS; and CITY OF	§	
GRAPEVINE, TEXAS,	§	
Defendants	§	

**MOTION FOR PROTECTIVE ORDER**

(Filed June 7, 1990)

TO THE HONORABLE DAVID O. BELEW, JR., JUDGE:

THE TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT; TIM CURRY, in his Official Capacity as Director of the Tarrant County Narcotics and Intelligence Unit; TARRANT COUNTY, TEXAS; and DON CARPENTER, in his Official Capacity as Sheriff of Tarrant County, Texas; Defendants, in the above numbered and entitled cause respectfully move this Court pursuant to Rule 26(c) FED. R. CIV. PROC., for a Protective Order directing that discovery propounded by the Plaintiffs not be had, and alternatively, that discovery propounded by Plaintiffs be stayed pending a decision on Defendants' Motion to Dismiss or for Summary Judgment for cause as follows:

## I.

This Motion for Protective Order is addressed to Plaintiffs' Amended Request for Production of Documents served on Defendants on May 22, 1990. Plaintiffs request production of the following:

Any and all documents relative to applications for "search and arrest" warrants, including but not limited to the "search and arrest" warrants themselves, the "search and arrest" affidavits, and the returns indicating the results of the execution of such warrants, since the formation of the Tarrant County Narcotics Intelligence and Coordination Unit in 1988, which

1. were initiated as a result of the detection of "odors associated" with the operation of an illegal drug manufacturing laboratory; and

a. were prepared at the request of or by members of the Tarrant County Narcotics Intelligence and Coordination Unit, or

b. which resulted in the issuance of search or arrest warrants in which personnel of the Tarrant County Narcotics Intelligence and Coordination Unit participated in executing such search or arrest warrants in either a primary or secondary capacity.

A true copy of Plaintiff's Amended Request for Production of Documents is attached hereto as Exhibit "A", and is incorporated herein by reference for all purposes as though set forth in its entirety.

The above requested documents specifically pertaining to the searches of the premises of Plaintiffs herein have been previously provided to Plaintiffs in Defendants' Motion to Dismiss or for Summary Judgment in this cause. Plaintiffs' Request for Production seeks the files in unrelated searches conducted by the N.I.C.U. both before and after the incidents made the basis of this action.

## II.

Defendants should not be required to produce the documents and tangible things requested at this time because:



1. Defendants' Motion to Dismiss or for Summary Judgment, which is potentially dispositive of the case, is pending;

2. Plaintiffs' Request for Production demands production of all documents associated with search warrants in other unrelated cases not relevant to the issues in this cause and is not reasonably calculated to lead to the discovery of admissible evidence in this cause. The only issue to which such could relate is the issue of "policy" or "practice" of Defendants to seek search warrants based primarily upon the detection of "odors associated with" the clandestine manufacture of illegal drugs. At least for purposes of the pending Motion to Dismiss or for Summary Judgment of Defendants, this is a fact which must be deemed admitted. Hence, Plaintiffs' attempted discovery, if relevant at all, which Defendants deny, is at best premature at this time and such should be deferred until this disposition of Defendants' Motion. It may be that this will never become a disputed issue or it is also possible that because of the disposition of the Defendants' Motion that this burdensome and expensive discovery will never be necessary in this cause. This is particularly important because of the very doubtful relevance of the requested documents and tangible things and the expense of obtaining them, if such can be done at all.

3. The files requested concern the investigative files of a law enforcement agency in both active and closed investigations and ongoing prosecutions, and, hence, are privileged;

4. Plaintiffs' Request for Production will subject Defendants to undue burden and expense. The location

and production of these files would be unduly burdensome and oppressive because they are not indexed as to the basis of the issuance of a probable cause warrant. Further, they are not maintained in any central location but are located in a warehouse, in the Office of the Criminal District Attorney in the custody of the individual prosecutors handling the case, and at the N.I.C.U. main office. There is no way to ascertain which drug investigation files involve search warrants based primarily on detection of "distinctive odors" associated with clandestine drug labs, and each drug case file would have to be examined individually. It is estimated that some 3,000 to 3,500 such files would have to be physically examined to comply with this request. Extensive use of law enforcement personnel would have to be employed. Attached hereto as Attachment B is the Affidavit of Brett Carr, Assistant District Attorney, and it is incorporated by reference herein for all purposes as though set forth herein in full. The extreme burden to Defendants of such an effort balanced against the dubious possibility of obtaining any relevant material to Plaintiffs in this case far outweighs the benefits to Plaintiffs; and

5. Plaintiffs' Request for Production is overly broad and seeks all documents and tangible things related to the obtaining of the search warrants, which would include the investigative files of Defendant N.I.C.U., a law enforcement agency, which are privileged, and would contain information as to confidential informants, investigative procedures, as well as attorney work product in the individual cases;

## IV.

This Motion for Protective Order does not substitute for or constitute the Defendants' answers, objections or other responses to Plaintiffs' specific discovery requests and all such specific responses are preserved.

WHEREFORE, Defendants move this Court to grant this Motion for Protective Order directing that discovery propounded by the Plaintiffs not be had, or, in the alternative, that discovery requested by Plaintiffs be stayed pending a decision on Defendants' Motion to Dismiss or for Summary Judgment, or that such discovery be had upon such terms and conditions as the Court shall consider appropriate.

Respectfully submitted,  
TIM CURRY  
CRIMINAL DISTRICT  
ATTORNEY  
TARRANT COUNTY, TEXAS

/s/ Barrie Howard  
BARRIE HOWARD  
Assistant District Attorney  
State Bar No. 10061720  
200 West Belknap  
Fort Worth, TX 76196-0201  
(817) 334-1233

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.  
Assistant District Attorney  
State Bar No. 19960000  
200 West Belknap  
Fort Worth, TX 76196-0201  
(817) 334-1233

ATTORNEYS FOR TARRANT  
COUNTY, TEXAS, AND  
TARRANT COUNTY  
NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Motion for Protective Order was this day served upon the attorney of record for Plaintiffs, Don Gladden, Law Offices of Don Gladden, P.O. Box 50686, Fort Worth, Texas, 76105-1497 in accordance with the provisions of Rule 5, FED. R. CIV. PROC.

Dated this 7th day of June, 1990.

/s/ Barrie Howard  
BARRIE HOWARD

CERTIFICATE OF CONFERENCE

I hereby certify that on this the 7th day of June 1990, I have conferred with the attorney of record for Plaintiffs concerning this matter and that we are unable to agree concerning the scope or timing of discovery in this matter. Therefore, this motion is contested.

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.

## EXHIBIT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN, ET AL	)
VS.	) CIVIL
	) ACTION NO.
TARRANT COUNTY NARCOTICS	) CA-89-842-K
INTELLIGENCE AND	)
COORDINATION UNIT, ET AL	)

PLAINTIFFS' AMENDED REQUEST FOR  
PRODUCTION OF DOCUMENTS

TO: The Tarrant County Narcotics Coordination and Intelligence Unit and Tarrant County, Texas, Defendants, by and through their attorney, Van Thompson, Jr., Assistant District Attorney, 200 West Belknap St., Fort Worth, Texas 76196-0201

The following Request for Production of Documents is made pursuant to Rule 34, Federal Rules of Civil Procedure. Plaintiffs hereby request that each such document, record, or other written material within the possession, custody, control or constructive possession, custody and control of Defendants and their attorneys be made available for inspection and copying within 30 days from service hereof in the office of Plaintiffs' attorney, Don Gladden, 2814 Avenue D, Fort Worth, Texas, 76105, or some other mutually agreeable location.

Definitions

The term "document" shall refer to all writings and materials of any kind, including, but not limited to,

orders instructions, reports, directives, summaries, interviews, complaints, statements (whether signed or unsigned), transcripts, regulations, memoranda, notes, correspondence, diagrams, maps and drafts. "Document" also refers to records including, but not limited to, photographs, microfilm, videotape, audiotape, motion pictures, microfilm, microfiche, tape computer runs and any codes necessary to comprehend such runs of any nature however produced or reproduced, and any other electronic or mechanical recording. "Document" includes originals and copies.

"Defendants" shall mean the Tarrant County Narcotics Intelligence and Coordination Unit, Tarrant County, Texas, their agents and employees, including but not limited to District Attorney Tim Curry, Assistant District Attorney Ann Diamond, Assistant District Attorney Brent A. Carr, their attorneys and/or anyone acting on their behalf.

Documents Requested

Any and all documents relative to applications for "search and arrest" warrants, including but not limited to the "search and arrest" warrants, themselves, the "search and arrest" affidavits, and the returns indicating the results of execution of such warrants, since the formation of the Tarrant County Narcotics Intelligence and Coordination Unit in 1988, which

1. were initiated as a result of the detection of "odors associated" with the operation of an illegal drug manufacturing laboratory; and



a. were prepared at the request of or by members of the Tarrant County Narcotics Intelligence and Coordination Unit, or

b. which resulted in the issuance of search or arrest warrants in which personnel of The Tarrant County Narcotics Intelligence and Coordination Unit participated in executing such search or arrest warrants in either a primary or secondary capacity.

Respectfully submitted,

LAW OFFICES OF DON GLADDEN  
P.O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

By: /s/ Don Gladden  
DON GLADDEN

ATTORNEY FOR PLAINTIFF

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the attorney for Defendants in accordance with the Federal Rules of Civil Procedure on this 22nd day of May, 1990.

/s/ Don Gladden  
DON GLADDEN

#### EXHIBIT B

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORTH WORTH DIVISION

CHARLENE LEATHERMAN and §  
KENNETH LEATHERMAN, §  
individually and as friends of §  
TRAVIS LEATHERMAN; §  
GERALD ANDERT; KEVIN §  
LEALOS and JERRY LEALOS, §  
Individually and as Next Friends §  
of SHANE LEALOS and TRAVOR §  
LEALOS; PAT LEALOS; DONALD §  
ANDERT; and LUCY ANDERT, §  
Plaintiffs §

vs. §

THE TARRANT COUNTY §  
NARCOTICS INTELLIGENCE §  
AND COORDINATION UNIT; §  
TIM CURRY, in his Official §  
Capacity as Director of the §  
Tarrant County Narcotics §  
Intelligence and Coordination §  
Unit; TARRANT COUNTY, TEXAS §  
DON CARPENTER, in his Official §  
Capacity as Sheriff of Tarrant §  
County, Texas; CITY OF LAKE §  
WORTH, TEXAS; and CITY OF §  
GRAPEVINE, TEXAS, §  
Defendants §

CIVIL ACTION  
NUMBER  
CA4-89-842-K

**AFFIDAVIT OF BRENT CARR**

THE STATE OF TEXAS       §  
                                       §  
 COUNTY OF TARRANT       §

BEFORE ME, the undersigned authority, on this day personally appeared BRENT CARR, who by me having been duly sworn made the following affidavit:

My name is Brent Carr. I am above the age of 21 years, fully competent to make this affidavit, and have personal knowledge of the matters of material fact hereinafter set forth, which are true and correct.

I am the Chief Prosecutor of the Tarrant County Narcotics Coordination and Intelligence Unit. I am familiar with the operations and records of this law enforcement agency. I am an attorney and licensed to practice law in the State of Texas.

Affidavits for search warrants are prepared by the individual officers assigned to the N.I.C.U. under the supervision of the supervising officers in their sector. No central index of these warrants is maintained. Investigative case files are kept by the name of the defendants involved or by the police offense number. These files are kept as to ongoing investigations by the investigating officer at his office. When an N.I.C.U. officer seeks to file charges he forwards a case report to the central N.I.C.U. The report is reviewed by one of the N.I.C.U. criminal prosecutors. If the prosecutor decides to file charges he does so and this results in the creation of a prosecution file which bears both the defendant's name and a case number. Attached hereto

is a true copy of a case screen which is representative of the information available in an individual case upon filing by the prosecutor. The N.I.C.U. prosecutor then decides whether the case will be retained by the N.I.C.U. for prosecution or forwarded to the Office of the District attorney for prosecution by a general felony prosecutor. If the case is forwarded to the Office of the District Attorney, it is first assigned to a Grand Jury attorney for presentation to the Grand Jury. Upon indictment the case is assigned to a felony trial attorney for prosecution and disposition. Upon ultimate disposition the prosecutorial file is closed and stored in the warehouse. Thus, prosecutorial files are located in four locations: N.I.C.U., the Grand Jury, the trial section, or the warehouse. From the time of its inception in January 1988 the N.I.C.U. has filed some 3,366 cases. However, the method of drug seizure is never administratively recorded.

There is no record maintained as to whether the individual cases even involve the use of a search warrant much less what information such was based upon, such as the detection of the distinctive odor associated with the manufacture of amphetamines. In order to ascertain whether individual cases involved the use of such a warrant it would be necessary to physically inspect each individual file. This would involve great expenditure of time and effort by personnel. It would be very difficult to estimate the amount of time which would be required to accomplish such a search of the records.

The investigative files of the N.I.C.U. officers files themselves could contain information

In addition evaluations made by reviewing attorneys are contained in these files the discovery of which could cause the disclosure of the attorneys work product.

The practice of relying upon the detection by a qualified police officer of the distinctive odors associated with the illegal manufacture of controlled substances as probable cause for the securing a search warrant when testified to before a magistrate is considered to be authorized by *Johnson v. United States*, 333 U.S. 10, 13 (1948); *Moulden v. State*, 576 S.W. 2d 817, 819-20 (Tex. Crim. App. 1978); *Tardiff v. State*, 548 S.W.2d 380, 383 (Tex. Crim. App. 1977).

Further, Affiant Sayeth not.

/s/ Brent R. Carr  
BRENT CARR

SWORN to and subscribed before me by the said  
Brent Carr, on this the 6th day of June, 1990.

/s/ Glenda Birdwell  
Notary Public in and for  
the State of Texas

SEAL

/s/ Glenda Birdwell  
Notary's Printed Name

My commission expires: 9-8-92

EXHIBIT B  
Att 1

### BASIC CASE DATA

CID=0228036  
NAME=

CASE NO=0395685  
DOB= 07-14-39

AGE= 50 RACE= W SEX= M

NOT IN JAIL

**ADDRESS:**

BLOCK S STREET/PO BOX APT CITY ST ZIP  
5700 BEACH ST FORT WORTH TX

OFFENSE CODE= 350030

OFFENSE= AGG POSS W/INT DEL C/S

OFFENSE DATE= 01-10-90 FILING DATE= 01-11-90

FILING AGENCY CODE= 52

FILING AGENCY= DEPT. PUBLIC SAFETY VOL/PAGE=

OFFENSE RPT NO.= NIB89107



CASE REMARKS=1/16/90 BOND SET  
 DOCKET NO=0395685A INDICTMENT DATE= 04-19-90  
 COURT= CDC3 DIR/CT= CDC3

DATE/NEXT

PRELIM COURT APPR= PRELIM COURT=  
 RECOM BOND AMOUNT= HOLD

WARRANT NO =

ACTUAL BOND AMT= 100000.00

BONDSMAN= BOX, DAVID

COMPANION CASES: 0395680 0395686 0395694

DEF ATTY= PROSCTR= CARR, BRENT A

DATE/NEXT COURT APPR= 06-25-90

DISPOSITION= REV ATTY= CARR, BRENT A  
 DISP DATE= FINE PAID= Y

SENTENCE= SENTENCE DATE= PROBATION TERM=  
 PF3-COMPLAINT, PF4-CLST APPEAL=

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF TEXAS  
 FORT WORTH DIVISION

CHARLENE LEATHERMAN and §  
 KENNETH LEATHERMAN, §  
 Individually and as Friends of §  
 TRAVIS LEATHERMAN; §  
 GERALD ANDERT; KEVIN §  
 LEALOS and JERRI LEALOS, §  
 Individually and as Next Friends §  
 of SHANE LEALOS and TRAVOR §  
 LEALOS; PAT LEALOS; DONALD §  
 ANDERT; and LUCY ANDERT, §

Plaintiffs §

vs. §

THE TARRANT COUNTY §  
 NARCOTICS INTELLIGENCE §  
 AND COORDINATION UNIT; §  
 TIM CURRY, in his Official §  
 Capacity as Director of the §  
 Tarrant County Narcotics §  
 Intelligence and Coordination §  
 Unit; TARRANT COUNTY, TEXAS; §  
 DON CARPENTER, in his Official §  
 Capacity as Sheriff of Tarrant §  
 County, Texas; CITY OF LAKE §  
 WORTH, TEXAS; and CITY OF §  
 GRAPEVINE, TEXAS, §

Defendants §

§ CIVIL ACTION  
 § NUMBER  
 § CA4-89-842-K

MEMORANDUM IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER

(Filed June 7, 1990)

TO THE HONORABLE DAVID O. BELEW, JR., JUDGE:

THE TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT; TIM CURRY, in his Official Capacity as Director of the Tarrant County Narcotics and Intelligence Unit; TARRANT COUNTY, TEXAS; and DON CARPENTER, in his Official Capacity as Sheriff of Tarrant County, Texas; Defendants, in the above numbered and entitled cause respectfully submit herewith their Memorandum in Support of Motion for Protective Order.

PRELIMINARY STATEMENT

By Amended Complaint, filed March 23, 1990, in addition to the original Plaintiffs, a whole new set of parties complaining of an additional entirely different occurrence were added, and the District Attorney and the Sheriff of Tarrant County were added as Defendants in their official capacities only.

Under the Complaint as now amended, both sets of Plaintiffs now assert violation of their constitutional rights guaranteed under the 4th and 14th Amendments of the Constitution to be free of unreasonable search and seizure. Plaintiffs by entirely conclusory allegations also assert that the alleged civil rights violations are the result of failure of the Defendants to properly train law enforcement officers under their control, and that the search and arrest warrants involved "were invalid when issued" and

do not state probable cause because they are based on the detection by the officers seeking the warrants of odors associated with chemicals utilized in the manufacture of illicit drugs by clandestine drug laboratories, which Plaintiffs assert "is insufficient as a matter of law to establish probable cause." Plaintiffs claim damages for emotional distress described as "anger, anguish, sleeplessness, humiliation and embarrassment."

Plaintiffs seek judgment of the Court "vindicating" their rights against unreasonable search and seizure, an unspecified amount of actual damages, and their costs and attorney fees under 42 U.S.C. §1988.

On April 17, 1990, the above-named Defendants filed their Motion to Dismiss or for Summary Judgment. This motion is potentially dispositive of the case. Indeed, a similar motion has previously been granted in this cause, although it was later set aside in order to allow Plaintiffs to replead on the question of "failure to train."

By Amended Request for Production of Documents, served May 22, 1990, Plaintiffs request production of the following:

Any and all documents relative to applications for "search and arrest" warrants, including but not limited to the "search and arrest" warrants, themselves, the "search and arrest" affidavits, and the returns indicating the results of the execution of such warrants, since the formation of the Tarrant County Narcotics Intelligence and Coordination Unit in 1988, which

1. were initiated as a result of the detection of "odors associated" with the operation of an illegal drug manufacturing laboratory; and

a. were prepared at the request of or by members of the Tarrant County Narcotics Intelligence and Coordination Unit, or

b. which resulted in the issuance of search or arrest warrants in which personnel of the Tarrant County Narcotics Intelligence and Coordination Unit participated in executing such search or arrest warrants in either a primary or secondary capacity.

The above requested documents specifically pertaining to the searches of the premises of Plaintiffs herein have been previously provided to Plaintiffs in Defendants' Motion to Dismiss or for Summary Judgment in this cause. Plaintiffs' Request for Production seeks the files in unrelated searches conducted by the N.I.C.U.

#### ARGUMENT AND AUTHORITIES

This discovery request is not relevant to this case, is not reasonably calculated to lead to the discovery of admissible evidence, and is wholly unnecessary at this time because the only issue such would be relevant to is that of the alleged practice of Defendant N.I.C.U. to seek and obtain search warrants based on the detection of distinctive odors associated with the clandestine manufacture of illegal drugs, such as amphetamines. This practice is deemed admitted for purposes of the pending motion to dismiss or for summary judgment.

It is clear in Rule 26(b)(1) that a matter must be "relevant" in order to be discoverable. The Rule provides that the "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject

matter of the pending action, . . . ." In considering relevancy the Supreme Court unanimously held in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978):

The key phrase in this definition - "relevant to the subject matter involved in the pending action" - has been construed broadly to encompass any matter that bears on, or that could reasonably lead to other matter that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388-389, 91 L.Ed. 451 (1947). Consistently with the notice pleading system established by the Rules, discovery itself is designed to help define and clarify the issues. *Hickman v. Taylor, supra*, at 500-501, 67 S.Ct. at 388-389. Nor is discovery limited to the merits of a case, for a number of fact related issues may arise during litigation that are not related to the merits.

Nevertheless, the Court refused to order the discovery of the names of the class members because those names had no bearing on the issues in the case and their disclosure "could not be forced into the concept of 'relevancy' described above." Likewise, in the instant cause the production of documents concerning other searches have no bearing on the issues here presented, except for the question of "policy", which is admitted at least for purposes of the pending Motion to Dismiss or for Summary Judgment, and cannot "be forced into the concept of 'relevancy'."

Further, Defendants have a pending Motion to Dismiss or for Summary Judgment which is potentially dispositive of this §1983 case. Hence, Plaintiffs should be required to respond to this motion prior to the making



such tangential at best and burdensome discovery upon Defendants.

Further, the documents requested involve both active investigative files as well as closed or disposed of cases. The files of law enforcement agencies are generally held to be privileged. Notice should be made of the extensive breadth of the definition of "documents" contained in the Request for Production itself.

In addition, this discovery request is overbroad and burdensome and oppressive because the documents Plaintiffs seek cannot be obtained, if indeed at all, except with great difficulty. Such would require the physical inspection of an estimated 3,000 to 3,500 case files located at various locations. There is no one central location at which these documents are maintained, and the documents cannot be located and recovered except with great difficulty and the vast expenditure of the time and labor to physically examine all the files relating to both open and closed N.I.C.U. cases in the Office of the Criminal District Attorney of Tarrant County, Texas, the offices of the N.I.C.U., and the warehouse. Defendants do not have readily available manpower to conduct such a massive search.

The discovery rules vest broad discretion in the District Court with respect to the control of the discovery process and, where necessary, the Courts may grant appropriate orders to deny, limit or qualify discovery in order to protect a party from undue burden or expense or to promote the ends of justice. Rule 26(c), FED. R. CIV. PROC., *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d

1204 (8th Cir. 1973) *cert. denied* 414 U.S. 1162 (1974); *Chemical and Industrial Corp. v. Druffel*, 301 F.2d 126 (6th Cir. 1962).

It is particularly true that the trial court may prohibit, defer or limit discovery when there is a dispositive motion which could resolve the issues raised. See *Brennan v. Local Union No. 639 Teamsters*, 494 F.2d 1092, 1100 (D.C. Cir. 1974); *Scroggins v. Air Cargo Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) (trial court has broad discretion to stay discovery until it rules on summary judgment motion); *New Orleans Public Serv. v. Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987) (trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined).

Further, in the instant cause, Plaintiffs seek production of documents which may reveal the identity of confidential informants. The identity of confidential informants is privileged. *United States v. Tucker*, 380 F.2d 206, 213 (2nd Cir. 1967).

Additionally, investigative files compiled for law enforcement purposes are privileged. See, *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977); *Brown v. Thompson*, 430 F.2d 1214 (5th Cir. 1970). This privilege is necessary as disclosure of investigatory files would undercut the Government's efforts to prosecute criminals by disclosing investigative techniques, deterring witnesses from coming forward and revealing certain facts of the Government's case. See: *Brown v. Thompson*, *supra* at 1215, wherein the Fifth Circuit upheld the refusal of the trial court to order production of relevant police investigative files:

The appellants concede that they would be unable to recover judgment without more evidence than that which they had been able to obtain. They had been denied access to the police report file on the investigation of the death of Brown. If access to the file was improperly denied it would follow that the judgment of dismissal with prejudice was error.

Government documents are an outstanding example of matter which is privileged and not subject to disclosure. 2B Barron & Holtzoff, Federal Practice and Procedure. p. 288, §1003. It will expire upon the lapse of an unreasonable length of time.

Likewise, in order to defeat a claim of executive privilege it is necessary for the plaintiff to show that the public interest in disclosure in the particular case outweighs the public interest protected by the privilege. Plaintiff must show a particularized need for the documents sought to be discovered in order to overcome the claim of privilege. In *Black v. Sheraton Corp. of America*, *supra* at 545, the D.C. Circuit held:

Judicial recognition of an executive privilege depends upon "a weighing of the public interests that would be served by a disclosure in a particular case." *Nixon v. Sirica*, 159 U.S.App. at 74, 487 F.2d at 716. A "demonstrated, specific need" for material may prevail over a generalized assertion of privilege, *United States v. Nixon*, 418 U.S. at 713, 94 S.Ct. 3090, but the claimant must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender." *Carl Zeiss, supra*, 40 F.R.D. at 328-29.

Finally, Plaintiffs seek production of documents which are privileged as attorney work product. See *Upjohn Co. v. U.S.*, 101 S.Ct. 677 (1977).

### CONCLUSION

Defendants respectfully submit that Plaintiffs' discovery requests concern investigative law enforcement files which are privileged, such are unduly burdensome and oppressive, and that for the reasons heretofore stated and discussed the requested production of Defendants' files should be denied, except to the extent such have already been produced, or at least deferred until disposition of Defendants' pending Motion to Dismiss or for Summary Judgment.

Respectfully submitted,

TIM CURRY  
CRIMINAL DISTRICT  
ATTORNEY  
TARRANT COUNTY, TEXAS

/s/ Barrie Howard  
BARRIE HOWARD  
Assistant District Attorney  
State Bar No. 10061720  
200 West Belknap  
Fort Worth, TX 76196-0201  
(817) 334-1233

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.  
Assistant District Attorney  
State Bar No. 19960000  
200 West Belknap  
Fort Worth, TX 76196-0201  
(817) 334-1233

ATTORNEYS FOR TARRANT  
COUNTY, TEXAS, AND  
TARRANT COUNTY  
NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Memorandum in Support of Motion for Protective Order was this day served upon the attorney of record for Plaintiffs, Don Gladden, Law Offices of Don Gladden, P.O. Box 50686, Fort Worth, Texas, 76105-1497 in accordance with the provisions of Rule 5, FED. R. CIV. PROC.

Dated this 7th day of June, 1990.

/s/ Barrie Howard  
BARRIE HOWARD

### CERTIFICATE OF CONFERENCE

I hereby certify that on this the 7th day of June, 1990, I have conferred with the attorney of record for Plaintiffs concerning this matter and that we are unable to agree concerning the scope or timing of discovery in this matter. Therefore, this motion is contested.

/s/ Van Thompson, Jr.  
VAN THOMPSON, JR.

---

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN, ET AL,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION
TARRANT COUNTY NARCOTICS	§	NO. 4-89-842-A
INTELLIGENCE AND	§	
COORDINATION UNIT, ET AL,	§	
Defendants.	§	

### ORDER

(Filed Dec. 31, 1990)

Came on to be considered:

1. Motion for Protective Order; and
2. Plaintiffs' Motion for Hearing on Defendants' Motion for Protective Order.

The court has concluded that there is no need for a hearing on the motion for protective order, which is supported by an affidavit.

The court, therefore, ORDERS that plaintiffs' motion for hearing on defendants' motion for protective order should be, and it is hereby, denied.

The court has determined that the protective order sought by defendants The Tarrant County Narcotics Intelligence and Coordination Unit, Tim Curry, in his official capacity as director of the Tarrant County Narcotics and Intelligence Unit, Tarrant County, Texas, and Don Carpenter, in his official capacity as Sheriff of Tarrant



County, Texas, should be granted. The court is of the opinion and finds that if said defendants were to be required to respond to the request for production of documents to which such motion for protective order is directed defendants would be put to undue burden, expense and annoyance, and there would be a serious risk that the law enforcement efforts of the defendants in this case would be inappropriately compromised if the discovery sought by plaintiffs were to be allowed.

The court, therefore, ORDERS that said motion for protective order should be, and it is hereby, granted, and that defendants need not make production in response to Plaintiffs' Amended Request for Production of Documents, which was served on defendants in May 1990.

SIGNED December 31, 1990.

/s/ John McBryde  
JOHN McBRYDE  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHARLENE LEATHERMAN, ET AL,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION
TARRANT COUNTY NARCOTICS	§	NO. 4-89-842-A
INTELLIGENCE AND	§	
COORDINATION UNIT, ET AL,	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Jan. 22, 1991)

For the reasons given in the memorandum opinion and order signed by the court contemporaneously with the signing of this final judgment,

The court ORDERS, ADJUDGES AND DECREES that all claims of plaintiffs, Travis Leatherman, acting through Charlene Leatherman and Kenneth Leatherman, as his next friends; Charlene Leatherman; Kenneth Leatherman; Gerald Andert; Donald Andert; Lucy Andert; Pat Lealos; Shane Lealos, acting through Kevin Lealos and Gerri Lealos, as his next friends; Travor Lealos, acting through Kevin Lealos and Jerri Lealos, as his next friends; Kevin Lealos; and Jerri Lealos, against defendants, The Tarrant County Narcotics Intelligence and Coordination Unit; Tim Curry, in his official capacity as Director of Tarrant County Narcotics and Coordination Unit, Tarrant County, Texas; Don Carpenter, in his official capacity as Sheriff of Tarrant County, Texas; City of Lake Worth, Texas; and

City of Grapevine, Texas, should be, and are hereby, dismissed;

The court further ORDERS, ADJUDGES and DECREES that none of the plaintiffs is to recover anything from any of the defendants; and,

The court further ORDERS, ADJUDGES and DECREES that each defendant shall recover costs of court incurred by him or it, as the case may be, from plaintiffs, jointly and severally.

SIGNED January 22, 1991.

/s/ John McBryde  
JOHN McBRYDE  
United States District Judge

---

**NO. 91-1657**



**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991**

---

**Charlene LEATHERMAN, et al.,**  
Petitioners  
**V.**

**TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,**  
Respondents

---

**On Writ Of Certiorari To  
The United States Court of Appeals  
For The Fifth Circuit**

---

**BRIEF FOR PETITIONERS**

---

**DON GLADDEN**  
Counsel of Record  
P.O. Box 50686  
Fort Worth, Texas 76105  
817-531-3667

**&**

**RICHARD GLADDEN**  
420 South Carroll, Suite E  
Denton, Texas 76201  
817-387-7833

**Attorneys for Petitioner**



## QUESTIONS PRESENTED

1. On a complaint brought pursuant to 42 U.S.C. Section 1983 alleging liability against a local governmental entity for constitutional violations caused by its failure to adequately train and supervise its police officers, is dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure due to the complaint's failure to satisfy a "heightened pleading" requirement:

A) prohibited by the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure; or

B) prohibited by the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right?

LIST OF PARTIES

Petitioners from Judgment Below<sup>1</sup>

Charlene Leatherman and Kenneth Leatherman,  
Individually and as Next of Friend of  
Travis Leatherman; Gerald Andert; Kevin Lealos  
and Jerri Lealos, Individually and as Next of  
Friends of Tavor Lealos and Shane Lealos;  
Pat Lealos; Donald Andert

Respondents

The Tarrant County Narcotics Intelligence  
and Coordination Unit; Tim Curry, in his Official  
Capacity as Director of the Tarrant County Narcotics  
and Coordination Unit of Tarrant County, Texas;  
Don Carpenter, in his official Capacity as Sheriff of  
Tarrant County, Texas; City of Lake Worth, Texas;  
City of Grapevine, Texas

---

<sup>1</sup>Lucy Andert, formerly a Plaintiff in the District  
Court, is deceased. The executors of Mrs. Andert's  
estate, through their counsel, have informed her counsel  
in this case that they do not desire to proceed with  
litigation of her claims herein.

TABLE OF CONTENTS

	Page
OPINIONS BELOW .....	1
JURISDICTION .....	2
STATUTES AND RULES INVOLVED .....	2
STATEMENT OF THE CASE .....	3
(i) STATEMENT OF FACTS .....	3
(ii) COURSE OF PROCEEDINGS .....	8
SUMMARY OF THE ARGUMENT.....	13
ARGUMENT .....	15
I.    DISMISSAL OF PETITIONERS' FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, DUE TO THE COMPLAINT'S FAILURE TO SATISFY A "HEIGHTENED PLEADING" REQUIREMENT, IS PROHIBITED BY THE FEDERAL RULES OF CIVIL PROCEDURE.....	15

II. DISMISSAL OF PETITIONERS' FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, DUE TO THE COMPLAINT'S FAILURE TO SATISFY A "HEIGHTENED PLEADING" REQUIREMENT, IS PROHIBITED BY THE RULES ENABLING ACT, 28 U.S.C. SECTION 2072(b), WHICH PROVIDES THAT RULES OF PRACTICE AND PROCEDURE SHALL NOT ABRIDGE, ENLARGE OR MODIFY ANY SUBSTANTIVE RIGHT. ....	21
CONCLUSION .....	30

# TABLE OF AUTHORITIES

Cases	Page
<u>Brower v. County of Inyo</u> , 817 F.2d 540 (9th Cir. 1987), <u>rev'd</u> , 489 U.S. 593 (1989) .....	20, 21
<u>Burlington Northern R. Co. v. Woods</u> , 480 U.S. 1 (1987) .....	23
<u>Conley v. Gibson</u> , 355 U.S. 41 (1957).....	13,16,20
<u>Denton v. Hernandez</u> , 504 U.S. ___, 112 S.Ct. 1728 (1992) .....	27
<u>Dioguardi v. Durning</u> , 139 F.2d 774 (2nd Cir. 1944) .....	20
<u>Elliott v. Perez</u> , 751 F.2d 1472 (5th Cir. 1985) .....	17
<u>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit</u> , 755 F.Supp. 726 (N.D. Tex. 1991), <u>aff'd</u> , 954 F.2d 1054 (5th Cir. 1992) .....	passim
<u>Lujan v. National Wildlife Federation</u> , 497 U.S. ___, 110 S.Ct. 3177 (1990) .....	21
<u>Means v. City of Chicago</u> , 535 F.Supp. 455 (N.D. Ill. 1982) .....	25
<u>Mitchell v. Forsyth</u> , 472 U.S. 511 (1989) .....	27
<u>Nietzke v. Williams</u> , 490 U.S. 319 (1989) .....	26



Cases	Page
<u>Owen v. City of Independence, Mo.</u> , 445 U.S. 622 (1980) .....	14, 17
<u>Pavelic &amp; LeFlore v. Marvel Entertainment Group</u> , 493 U.S. ___, 110 S.Ct. 456 (1989) .....	17
<u>Radovich v. National Football League</u> , 352 U.S. 445 (1957) .....	24
<u>Sibbach v. Wilson &amp; Co.</u> , 312 U.S. 1 (1941) .....	23, 27
<u>Siegart v. Gilley</u> , 500 U.S. ___, 111 S.Ct. 1789 (1991).....	29
<u>Valley v. Maule</u> , 297 F.Supp. 958 (D.Conn. 1968) .....	25
<u>Webster v. City of Houston</u> , 735 F.2d 838 (5th Cir. 1984) (en banc) .....	24
<u>Statutes, Codes and Constitutional Provisions:</u>	
28 U.S.C. Section 1254(1) .....	2
28 U.S.C. Section 2072.....	i, iv, 2, 14, 21, 23, 28, 29
42 U.S.C. Section 1983 .....	passim
Rule 8, Federal Rules of Civil Procedure .....	passim
Rule 9, Federal Rules of Civil Procedure .....	18

	Page
Rule 11, Federal Rules of Civil Procedure .....	26
Rule 12, Federal Rules of Civil Procedure .....	passim
Rule 20(a), Federal Rules of Civil Procedure ...	10
Rule 27, Federal Rules of Civil Procedure .....	19
Rule 56, Federal Rules of Civil Procedure .....	11, 19
Fourth Amendment to the United States Constitution .....	3
The Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. Article 6252-17a, Section 3(a)(3) (Vernon Supp. 1992) .....	19
<u>Other Sources:</u>	
Burbank, <u>The Rules Enabling Act of 1934</u> , 130 U.Pa.L.Rev. 1015 (1982) .....	22, 23
Marcus, <u>The Revival of Fact Pleading Under Federal Rules of Civil Procedure</u> , 86 Colum.L.Rev. 433 (1986) .....	27
Schwartz and Kirklin, <u>Section 1983 Litigation: Claims, Defenses and Fees</u> , Vol. I, Section 1.6 (1991) .....	19

Wingate, <u>A Special Pleading Rule for Civil Rights Complaint: A Step Forward or a Step Back?</u> , 49 Mo.L.Rev. 677 (1984) .....	25
C. Wright & A. Miller, <u>Federal Practice and Procedure</u> , Section 2071 (1969) .....	19

NO. 91-1657

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991

---

Charlene LEATHERMAN, et al.,  
Petitioners

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,  
Respondents

---

On Writ Of Certiorari To  
The United States Court of Appeals  
For The Fifth Circuit

---

BRIEF FOR PETITIONERS

---

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered February 28, 1992, and from which review is sought, are reported at 954 F.2d 1054 (5th Cir. 1992), and are attached in the Appendix to the Petition for Writ of Certiorari beginning at page 1a.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas entered January 22, 1991, and from which Petitioners appealed, are reported at 755 F.Supp. 726 (N.D. Tex. 1991), and are attached in the Appendix of the Petition for Writ of Certiorari beginning at page 25a.

#### JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought on February 28, 1992. The Petition for Writ of Certiorari was filed on April 16, 1992, and granted on June 22, 1992. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

#### STATUTES AND RULES INVOLVED

This case arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the Questions presented involve another statute, the Rules Enabling Act, 28 U.S.C. Section 2072, and Rule 8 of the Federal Rules of Civil Procedure. These statutes and rule are reprinted in the Appendix to the Petition for Writ of Certiorari at pages 55a-56a.

#### STATEMENT OF THE CASE

This case arises out of two separate searches of private residential dwellings conducted by law enforcement officers in Tarrant County, Texas, on January 30, and May 30, 1989. The Petitioners herein alleged in their First Amended Complaint, inter alia, that the searches in question were carried out in an unconstitutional manner in violation of the Fourth Amendment, and that the Respondent local governmental entities, through their respective failures to adequately train and supervise their police personnel, are liable to Petitioners under 42 U.S.C. Section 1983.

#### (i) STATEMENT OF THE FACTS<sup>2</sup>

At approximately 8 o'clock p.m. on January 30, 1989, Petitioner Gerald Andert and his family were gathered at Gerald's home located in the 2000 block of Kimball Road in the City of Southlake, Texas, mourning the tragic death of Marie Andert, Gerald's wife and the matriarch of the Andert family, who had died two days

---

<sup>2</sup>Petitioners' statement of facts is a virtually verbatim restatement of factual allegations contained in their First Amended Complaint. See Joint Appendix, pages 32-36.



earlier after a three-year battle with cancer. Present at the residence were Petitioners Kevin and Jerri Lealos (Gerald's son-in-law and daughter, respectively, who also lived at the residence, hereinafter referred to as the "Andert" residence); Shane and Trevor Lealos (respectively the daughter and son of Kevin and Jerri Lealos); Petitioner Pat Lealos (Kevin's sister who had flown in from El Paso, Texas, for the funeral); Petitioner Donald Andert (Gerald Andert's son); and Lucy Andert (Gerald's 76 year old sister-in-law).

Moments after 8 o'clock on the evening in question, and completely without prior warning, numerous law enforcement officers of the Defendant City of Grapevine and Defendant TCNICU broke into the Andert home. Upon hearing the French doors of the house breaking open, Gerald Andert, who at the time was seated in the kitchen area of his home looking at photographs of his late wife, turned to determine what was going on. As Gerald turned around, an unidentified officer knocked him backwards, breaking the back of the wooden chair in which he was sitting. Upon turning back toward the officer and raising his arms to deflect another blow, Gerald was without

provocation clubbed twice on the head by the officer, causing a severe cut to Gerald's forehead which would later require 11 stitches to close.

During the extended period of time during which Gerald Andert and members of his family were required to lie face down on the floor, held at gunpoint, fearing for their lives and still unaware of the identity of these armed intruders, several requests for identification were made of the law enforcement officers present. The officers responded to these requests for identification by shouting obscenities and threats at the persons requesting such information. Upon the conclusion of their search of the Andert residence some 1 1/2 hours later, and having discovered no items which could form the basis of a criminal prosecution, the officers left the premises without so much as an apology for their wrongful search of the Andert residence, or the grossly abusive manner in which the search was carried out.

The second search in question occurred on May 20, 1989. On that date Petitioner Charlene Leatherman and her son, Travis Leatherman were stopped in the 8200 block of Cahoba Road in Fort Worth, Tarrant County, Texas, by law enforcement officers in a marked

police car. Immediately after Charlene brought her vehicle to a stop, she was surrounded by several men, later discovered to be plain clothes police officers, who were armed with hand guns and other weapons. The plain clothes police officers shouted a variety of instructions to Charlene and Travis and threatened to shoot each of them. The plain clothes police officers proceeded to identify Charlene and Travis, and moments latter informed them that law enforcement officers executing a warrant had shot to death two dogs belonging to the Leathermans and were in the process of conducting a search of the Leatherman residence. When Charlene inquired of the officer apparently in charge of the search as to why the family dogs had been shot, the officer replied that this was "standard procedure." The search of the Leatherman's home was planned and carried out by law enforcement officers employed by or under the control of TCNICU, Tarrant County and the City of Lake Worth.

On returning to their residence, Charlene and Travis Leatherman discovered "Shakespeare," the smaller of the two family dogs owned by the Leathermans, lying shot to death approximately 25 feet from the main

doorway entrance to their home. Shakespeare appeared to have been shot three times: once in the stomach, once in the leg, and once in the head. Upon entering the doorway of the residence, it appeared that "Ninja," the larger of the two dogs owned by the Leathermans, had defecated just inside the door of the residence. Ninja was subsequently discovered on top of a bed located in a rear bedroom of the house. Ninja had been shot in the head at close range, apparently with a shotgun, which resulted in brain matter being splattered across the bed, against the wall, and on the floor around the bed.

Upon the conclusion of the search of the Leatherman residence, and having discovered no items described in the warrant which could otherwise have provided a basis for a criminal prosecution, the officers verbally acknowledged to Charlene and Travis their "mistake" in having searched the Leatherman residence. Instead of leaving at this time however, the officers removed lawn chairs from a truck in which they had arrived and proceeded to lounge about the driveway and yard of the Leatherman residence for approximately 1 1/2 hours, drinking beer, smoking, talking, laughing, and essentially

having a party to celebrate their seemingly unbridled governmental power.

(ii) COURSE OF PROCEEDINGS

On November 22, 1989, Petitioners Charlene and Kenneth Leatherman, individually and in their capacities as Next Friends of their son, Travis Leatherman (the "Leatherman" Plaintiffs), filed suit in the 96th Judicial District Court of Tarrant County, Texas, against Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU") and Tarrant County, Texas, alleging Respondents TCNICU and Tarrant County were liable for their damages arising out of the illegal entry and search of their residence on May 20, 1989. The Leatherman plaintiffs brought their claims under both 42 U.S.C. Section 1983 and State law.

On December 12, 1989 Respondents TCNICU and Tarrant County petitioned the United States District Court for the Northern District of Texas to remove the Leatherman plaintiffs' claims to federal court. (R.I,1). Eight days later, on December 20, 1989, Respondents TCNICU and Tarrant County filed their answer to the Leatherman plaintiffs' petition (which had originally been filed in state court), and contemporaneously filed

a fifty page "Motion to Dismiss or for Summary Judgment" and supporting memorandum of law. On February 1, 1990, the District Court entered an order dismissing the Leatherman plaintiffs' claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that the plaintiffs' state court petition for relief "fail[ed] to allege any custom [,] practice or usage from which a policy may be inferred." (R.I,70).

On February 8, 1990, the Leatherman plaintiffs, after retaining additional counsel, filed in the District Court a motion to vacate the District Court's February 1, 1990 order dismissing their complaint. The Leatherman plaintiffs also sought leave of the Court to amend their pleadings. (R.I,71). On March 8, 1990, the District Court granted the Leatherman plaintiffs' motion to vacate its February 1, 1990 order of dismissal, and granted them leave to amend their complaint within 20 days. (R.I,88).

On March 23, 1990, Petitioners Charlene and Kenneth Leatherman timely filed their First Amended Complaint in accordance with the District Court's order. The Leatherman plaintiffs named as defendants both TCNICU and Tarrant County, Texas, who had been



defendants in the plaintiffs' original complaint, as well as an additional defendant, the City of Lake Worth, Texas, whom plaintiffs had determined was also involved in the search of their residence on May 20, 1989.<sup>3</sup> Pursuant to Rule 20(a) of the Federal Rules of Civil Procedure, and based on their interpretation of the "transaction and common question requirements" of Rule 20(a), the Leatherman plaintiffs also joined as additional plaintiffs Petitioners Gerald Andert; Kevin and Jerri Lealos, individually and as next friends of Shane and Trevor Lealos; Pat Lealos; Donald Andert and Lucy Andert (the "Andert" plaintiffs). The Lealos plaintiffs' claims against Respondents TCNICU and Tarrant County were based on the illegal search of the Andert residence on January 30, 1989, and named as an additional defendant the Respondent City of Grapevine, Texas.

After all Respondents had filed their answers to Petitioners' First Amended Complaint, Respondents

---

<sup>3</sup>The amended complaint also named two individuals, Curry and Carpenter, in their official capacities. As no personal liability was alleged against Curry or Carpenter, the only real parties in interest here are the Respondent governmental entities.

TCNICU and Tarrant County on April 17, 1990, filed their second "Motion to Dismiss or for Summary Judgment." On June 7, 1990, Respondents TCNICU and Tarrant County filed a motion for a protective order seeking to insulate them from discovery sought by Petitioners in their "Amended Request for Production of Documents." (R.II,249). On June 18, 1990, Petitioners filed their response to Respondents TCNICU and Tarrant County's Motion to Dismiss or for Summary Judgment, and expressly requested therein that the District Court defer consideration of the Respondents' motion for summary judgment, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, on the ground that the discovery sought by Petitioners in their Amended Request for Production of Documents, to which the Respondents objected, would provide facts essential to their opposition to Respondents' motion for summary judgment. (R.II,362,390-391). On July 20, 1990, Petitioners filed a motion for a hearing on Respondents TCNICU and Tarrant County's Motion for Protective Order, and requested therein that the District Court set an early

date for the hearing on Respondents' motion for protective order.

On December 31, 1990, the District Court granted Respondents TCNICU and Tarrant County's Motion for a Protective Order and denied Petitioners' request for a hearing on that motion. (R.II,453). On January 22, 1991, barely three weeks later, the District Court granted Respondents TCNICU and Tarrant County's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that Petitioners' First Amended Complaint did not satisfy the Fifth Circuit's "heightened pleading" requirement. In the alternative, the District Court granted Respondents TCNICU and Tarrant County's motion for summary judgment, and thereafter sua sponte dismissed and granted summary judgment in favor of Respondents City of Grapevine and City of Lake Worth with respect to the remainder of the Petitioners' claims. (R.II, 457).

On appeal, the United States Court of Appeals for the Fifth Circuit, in a majority opinion written by the Honorable Irving L. Goldberg, affirmed. Pet. App. at page 2a, 954 F.2d at 1055. The majority opinion for the Court of Appeals rested its decision to affirm solely on

the ground that the Petitioners' First Amended Complaint had failed to satisfy the Fifth Circuit's "heightened pleading" requirement. See Pet. App. at page 14a n.6, 954 F.2d at 1058 n.6.

In a specially concurring opinion, also written by him, Judge Goldberg noted that he was "impressed by the wealth of authority plaintiffs cite in support of their position" challenging the heightened pleading requirement, Pet. App. at page 23a-24a, 954 F.2d at 1061, but noted further that, in light of preexisting Fifth Circuit precedent, he found himself "constrained to obey the command of the heightened pleading requirement" in the Petitioners' case. Ibid.

Following the decision of the Court of Appeals rendered February 28, 1992, the Petitioners on April 16, 1992, filed a Petition for Writ of Certiorari. This Court granted the Petition on June 22, 1992.

#### SUMMARY OF THE ARGUMENT

1. The "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957). In this case, imposition of such a

requirement, which requires plaintiffs in civil rights cases to allege with particularity the evidentiary support for their claims prior to discovery, cannot be justified on the basis of an individual governmental defendant's assertion of the affirmative defense of qualified immunity under 42 U.S.C. Section 1983. The Respondents in the present case are all local governmental entities which, under this Court's decision in Owen v. City of Independence, Mo., 455 U.S. 622 (1980), cannot rely on an absolute or qualified immunity defense.

2. To the extent Federal Rule of Civil Procedure 8(a)(2) can be construed to require greater factual specificity for a plaintiff's allegations depending on "the nature of the claim" presented, Rule 8(a)(2) violates that part of the Rules Enabling Act, 28 U.S.C. Section 2072(b), which provides that the Congressional delegation of rulemaking authority to the Supreme Court does not include the power to adopt rules that "abridge, enlarge or modify any substantive right." By imposing solely upon plaintiffs bringing suit under 42 U.S.C. Section 1983 the burden of pleading evidence to support their claims prior to discovery, the heightened

pleading requirement effectively nullifies, and thereby "abridges," the remedial right provided under Section 1983 when evidence necessary to satisfy the heightened pleading requirement remains in the exclusive possession of a defendant. The heightened pleading requirement also confers upon local governmental defendants sued under Section 1983 the functional equivalent of a substantive qualified immunity from discovery. In this latter sense, the heightened pleading requirement impermissibly "enlarges" a local governmental entity defendant's substantive rights at the expense of the plaintiff.

## ARGUMENT

### I

DISMISSAL OF PETITIONER'S FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, DUE TO THE COMPLAINT'S FAILURE TO SATISFY A "HEIGHTENED PLEADING" REQUIREMENT, IS PROHIBITED BY THE FEDERAL RULES OF CIVIL PROCEDURE.

Dismissal of a complaint for failure to state a claim upon which relief can be granted, due to an alleged failure "to set forth specific facts," is governed by Rule



8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957). In Conley the respondents argued, like the Respondents in the instant case have successfully argued below, that the complaint they challenged "failed to set forth specific facts to support its general allegations." Id., 355 U.S. at 47. The Supreme Court rejected this challenge in Conley with the following holding:

"[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [quoting Rule 8(a)(2)] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id., 355 U.S. at 47.

While it remains unclear upon what authority the lower Courts have relied to depart from the rule announced in Conley and impose a requirement that civil rights plaintiffs plead specific factual detail in support of their claims, in the Fifth Circuit two rationales have been advanced to support this departure: first, that a need for specific factual detail in

a civil rights complaint is necessary in order to avoid "frustration of the protections and policies underlying the [qualified] immunity doctrine," Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985); and second, that "what is short and plain [under Rule 8(a)(2)] has no universal meaning independent of the nature of a claim," Elliott, supra, 751 F.2d at 1483 (Higginbotham, J., concurring).

The first justification for a heightened pleading requirement noted above, *i.e.*, to avoid interference with a public official's qualified immunity from suit, does not apply in cases such as the present one where only a governmental entity is the named defendant. Under Section 1983, local governmental entities are not entitled to assert either an absolute or qualified immunity from suit. See Owen v. City of Independence, Mo., 445 U.S. 622 (1980).

To the extent it may be argued that what is "short and plain" under Rule 8(a)(2) depends on the nature of a claim, such an argument conflicts with both the plain meaning of the Federal Rules as well as the legislative history of the rules. Federal courts are obliged to "give the Federal Rules of Civil Procedure their plain meaning," Pavelic & LeFlore v. Marvel Entertainment

Group, 493 U.S. 120, 123 (1989), and "to apply the text, not to improve upon it." Id., 493 U.S. at 126. Neither Rule 8(a)(2), nor the term "short and plain," manifest any intent on the part of the drafters of the Federal Rules of Civil Procedure to require varying requirements of factual particularity in pleadings depending on the "nature of the claim."

Moreover, any assumption that greater specificity was intended under the rules depending on the particular "nature of a claim" is also refuted by the fact that when the drafters wanted to require greater specificity in pleading, they knew how to do it. Rule 9(b) of the Federal Rules of Civil Procedure expressly requires greater factual specificity only for claims alleging fraud or mistake. By negative implication, it is therefore clear that neither the Advisory Committee, the Supreme Court, nor Congress intended to require that civil rights plaintiffs plead their claims with greater factual particularity than other claimants generally.<sup>4</sup>

---

<sup>4</sup>Rule 9(b) also provides that "[m]alice intent, knowledge and other condition of mind of a person may be averred generally." This part of Rule 9(b) would seem directly applicable to allegations of "deliberate indifference" such as alleged in this case.

There are also several serious "pragmatic and theoretical difficulties with the heightened pleading requirement," Schwartz and Kirklin, Section 1983 Litigation: Claims, Defenses and Fees, Vol. I, Section 1.6, at page 20 (1991), particularly where evidence needed to be pled in order to satisfy the heightened pleading requirement rests in the exclusive possession of a defendant. While Rule 56(f) of the Federal Rules of Civil Procedure permits discovery to proceed when a plaintiff cannot fairly be expected to present facts essential to support his claim, the heightened pleading requirement does not, and neither the federal rules nor local state law generally permit discovery, prior to commencing suit, in order to secure evidentiary support for a plaintiff's claim. See C. Wright & A. Miller, Federal Practice and Procedure: Civil, Section 2071 (1969), at pages 332-33 (discussing limitations on prefiling discovery under Fed. R. Civ. P. 27(a)); and e.g., the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. Article 6252-17a, section 3(a)(3) (Vernon Supp. 1992) (exempting from disclosure "information relating to litigation...to which the state or political subdivision...[or] an officer or employee of the state or

political subdivision, as a consequence of his office or employment, is or may be a party....").

The Reporter of the Supreme Court's Committee on the Rules of Civil Procedure which drafted Rule 8, later sitting as an appellate judge, has confirmed in a decision cited favorably by the Supreme Court in Conley v. Gibson, 335 U.S. at 46 n.5, that "there is no pleading requirement [under the Federal Rules of Civil Procedure] of 'stating facts sufficient to constitute a cause of action.'" Dioguardi v. Durning, 139 F.2d 774, 775 (2nd Cir. 1944) (Opinion per Charles E. Clark, J.). In keeping with this understanding of the federal rules, the Supreme Court has applied the "notice pleading" standard adopted in Conley v. Gibson, 355 U.S. 41 (1957) to claims alleging municipal liability under 42 U.S.C. Section 1983. In Brower v. County of Inyo, 489 U.S. 593, 598 (1989), the Supreme Court held that Section 1983 plaintiffs had adequately pled a claim against a local governmental entity. The Court did so, moreover, despite the fact that, as the Court of Appeals in Brower noted, the plaintiffs' first amended complaint contained "little more than bare conclusions." Id., 817 F.2d 540, 544 (9th Cir. 1987). For the Supreme Court

to have held that the Brower first amended complaint adequately stated a claim is not remarkable once it is understood that consideration of a Rule 12(b) motion, unlike a Rule 56 motion, requires a "presum[ption] that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. National Wildlife Federation, 497 U.S. \_\_\_, 110 S.Ct. 3177, 3189 (1990).

## II

DISMISSAL OF PETITIONERS' FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, DUE TO THE COMPLAINT'S FAILURE TO SATISFY A "HEIGHTENED PLEADING" REQUIREMENT, IS PROHIBITED BY THE RULES ENABLING ACT, 28 U.S.C. SECTION 2072(b), WHICH PROVIDES THAT RULES OF PRACTICE AND PROCEDURE SHALL NOT ABRIDGE, ENLARGE OR MODIFY ANY SUBSTANTIVE RIGHT.

Should the Supreme Court conclude that Rule 8(a)(2) of the Federal Rules of Civil Procedure authorizes selective application of a "heightened pleading" requirement to certain cases depending on the "nature of the claim," the Court must then consider whether Rule 8(a)(2), as so applied, violates that part of the



Rules Enabling Act, 28 U.S.C. Section 2072 (b), which provides that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right." Consideration of the Act and its pre-1934 legislative history compels the conclusion that Rule 8(a)(2), to the extent it authorizes any disparity in treatment between civil rights cases and all other cases, is invalid.

As Professor Stephen B. Burbank has noted in his comprehensive article, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982), the Rules Enabling Act since its enactment has contained a "procedure/substance dichotomy" in its delegation of rulemaking authority. Id., at 1106. On the one hand, Congress has delegated rulemaking authority to the Supreme Court "to prescribe general rules of practice and procedure...in the United States District Courts," 28 U.S.C. Section 2072(a), but at the same time has directed that rules promulgated under the Act "shall not abridge, enlarge or modify any substantive right." Id., Section 2072(b). The latter provision, which has been construed by the Supreme Court as manifesting an intent by Congress to withhold rulemaking power to "'abridge, enlarge or modify substantive rights' in the guise of regulating

procedure," Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941), expresses a Congressional decision "to allocate policy choices---to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights."<sup>5</sup> It is evident that the "heightened pleading" requirement made applicable only to civil rights cases, insofar as it may be a part of Rule 8(a)(2), contravenes the Congressional allocation of policymaking choices intended by the procedure/ substance dichotomy contained in the Rules Enabling Act.

By design, the "heightened pleading" requirement does not merely "incidentally affect [a civil rights] litigant's substantive rights" in a manner that is "reasonably necessary to maintain the integrity" of federal practice and procedure. Burlington Northern R. Co. v. Woods, 480 U.S. 1, 5 (1987) (considering challenge based on Rules Enabling Act). Rather, it imposes a burden on civil rights plaintiffs that is impossible to meet, and thus impermissibly "add[s]

---

<sup>5</sup>Burbank, The Rules Enabling Act of 1934, supra, 130 U. Pa. L. Rev. at 1113.

requirements to burden the private litigant beyond what is specifically set forth by Congress." Radovich v. National Football League, 352 U.S. 445, 454 (1957) (rejecting "technical objections" to sufficiency of Sherman Act complaint). In cases such as the instant one, where the theory of respondent superior does not apply, civil rights claimants who have sued local governmental entities may be required to establish that an individual police officer has violated their constitutional rights as a result of the "deliberate indifference" of an official policymaker or in accordance with a preexisting "persistent, widespread custom or practice" of the local governmental entity itself. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc). The "heightened pleading" requirement, as applied to claims against local governmental entities prior to discovery, imposes an impossible burden on a plaintiff where, as here, the evidence necessary to allege with specificity this element of his claim is in the exclusive hands of the defendant governmental entity. As one Court has noted:

"We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to

discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, i.e., that there was an official policy or de facto custom which violated the Constitution." Means v. City of Chicago, 535 F.Supp. 455, 460 (N.D. Ill. 1982)

Nor does the decisional development of the heightened pleading requirement reflect that it is motivated substantially by a neutral concern for procedural, as opposed to substantive, matters. For example, in Valley v. Maule, 297 F.Supp. 958 (D.Conn 1968), a case referred to by one commentator as "[t]he first case to announce a special pleading rule for civil rights cases,"<sup>6</sup> the court provided the following rationale for its selective imposition of the heightened pleading requirement:

"In recent years there has been an increasingly large volume of cases brought under the civil rights act. A substantial number of these cases are frivolous or

---

<sup>6</sup> Wingate, A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?, 49 Mo. L. Rev. 677, 683 (1984).

should be litigated in the State courts; they all cause defendants---public officials, policemen and citizens alike--considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims." Id., 297 F.Supp. at 960-61.

While it certainly is "an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation," ibid., the fact that there is "an increasingly large volume of cases brought under the civil rights act" does not justify, without affirmative Congressional action, adoption of a procedural rule designed to effectively abolish or nullify a statutory remedy involving important federal rights. The requirement in Rule 11 of the Federal Rules of Civil Procedure that an attorney or party who signs a pleading certify that the pleading is "to the best of the signer's knowledge...well grounded in fact," together with the availability of appropriate sanctions including the payment of attorney's fees for violation of the certification requirement, provides adequate protection

to those persons who might be subjected to "frivolous" or "vexatious" claims.

Moreover, except in those infrequent cases in which a plaintiff's claims can fairly be said to describe "fantastic or delusional scenarios," Denton v. Hernandez, 504 U.S. \_\_\_, 112 S.Ct.1728, 1733 (1992), quoting Nietzke v. Williams, 490 U.S. 319, 328 (1989), dismissal of a case for failure to satisfy a heightened pleading requirement does not provide a reliable means of distinguishing between "frivolous" and "legitimate" claims. At the pleading stage, a judge "must guess whether the plaintiff, if allowed discovery, will be able to gather evidence to support his claims. Uninformed judicial speculation is not an adequate means of arriving at correct decisions on the merits." Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 483 (1986). To the extent Rule 8(a)(2) authorizes such judicial speculation when applying the heightened pleading requirement, it impermissibly abridges and modifies the substantive rights of civil rights litigants "in the guise of regulating procedure." Sibbach v. Wilson & Co., *supra*, 312 U.S. at 10.



Extending the functional equivalent of a qualified immunity defense to local governmental entities through adoption of a heightened pleading requirement in order to eliminate pretrial discovery likewise operates to impermissibly "enlarge" the substantive rights of the local governmental entity defendant. Recognition of the "substantive" defense of qualified immunity, as applied to state officials sued in their individual capacities, rests on a conclusion that under certain circumstances "the Congress that enacted the 1871 Civil Rights Act did not intend to subject them to damages liability." Mitchell v. Forsyth, 472 U.S. 511, 538 (1985) (Stevens, J., concurring). As Petitioners have noted, *supra* at page 17, qualified immunity is not a substantive defense available to governmental entities, and therefore cannot serve as a basis for imposing the heightened pleading requirement to claims alleging liability against local governmental entities. Assuming arguendo that imposition of the heightened pleading requirement in cases in which a qualified immunity defense may properly be raised is necessary to recognize the substantive remedial scope of Section 1983 and avoid violation of the Rules Enabling Act, 28 U.S.C. Section

2072,<sup>7</sup> the same cannot be said with regard to claims brought against local governmental entities. In the latter context application of the heightened pleading requirement when no substantive qualified immunity defense exists "abridges" the substantive remedial rights provided to the plaintiff by Section 1983.

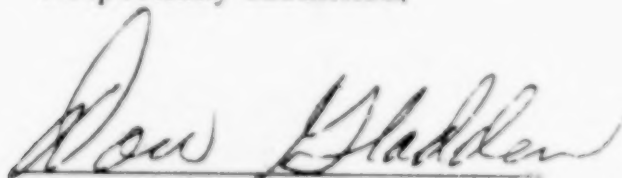
---

<sup>7</sup>Such an argument was made by the Acting Solicitor General in his brief for the respondent in Siegart v. Gilley, 500 U.S. \_\_\_, 111 S.Ct. 1789 (1991), at page 25.

CONCLUSION

For the foregoing reasons, Petitioners pray that the February 28, 1992 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit will be reversed and this case remanded for further proceedings.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Don Gladden", written over a horizontal line.

DON GLADDEN\*

P. O. Box 50686

Fort Worth, Texas 76105

817-531-3667

RICHARD GLADDEN

420 South Carroll, Suite E

Denton, Texas 76201

817-387-7833

ATTORNEYS FOR PETITIONERS

\* Counsel of Record

9  
No. 91-1657

Supreme Court of the United States  
FILED  
OCT 1 1992  
OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1992

CHARLENE LEATHERMAN, ET AL.,  
*Petitioners,*  
vs.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, ET AL.,  
*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit

BRIEF OF RESPONDENT CITY OF  
LAKE WORTH, TEXAS

TIM G. SRALLA

WAYNE K. OLSON\*

Members of the Firm of:  
FIELDING, BARRETT & TAYLOR  
8851 Highway 80 West, Suite 300  
Fort Worth, Texas 76116-6041  
Telephone: (817) 560-0303  
Facsimile: (817) 560-3953

*Attorneys for Respondent  
City of Lake Worth, Texas*

\*Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964  
OR CALL COLLECT (402) 342-2831

**BEST AVAILABLE COPY**



## QUESTIONS PRESENTED

1. Whether dismissal of an action brought pursuant to 42 U.S.C. § 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. § 2072?
2. Whether dismissal of a complaint brought pursuant to 42 U.S.C. § 1983 against a municipality is proper, on the grounds that the complaint contains only conclusory allegations that track the elements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?
3. Whether a plaintiff should be allowed to plead the existence of a governmental policy in conclusory terms in an action against a governmental entity under 42 U.S.C. § 1983, so as to eviscerate the governmental entity's immunity from suit, in contravention of the dictates of the Rules Enabling Act?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATUTES AND RULES INVOLVED.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT .....	7
ARGUMENT .....	8
1. Municipal liability under 42 U.S.C. § 1983 is limited to actions taken pursuant to municipal policy.....	8
2. The Complaint failed to show the existence of a municipal policy. ....	9
3. Municipalities are entitled to sovereign immunity from § 1983 lawsuits in the absence of the existence of a municipal policy. ....	12
4. The Fifth Circuit's application of a "heightened pleading" requirement under Rule 8 is appropriate in cases such as the one at bar. ....	17
5. Application of the "heightened pleading" requirement is not necessary to sustain dismissal of Petitioners' claim against Lake Worth.....	22
6. The holding of the Fifth Circuit does not violate the Rules Enabling Act, 28 U.S.C. § 2072. ....	34
7. Any result other than dismissal would itself violate the Rules Enabling Act. ....	36

## TABLE OF CONTENTS - Continued

	Page
8. Even if the Fifth Circuit erred in dismissing the Complaint, summary judgment for all defendants was still warranted. ....	37
CONCLUSION .....	38

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) .....	19, 33
<i>Arnold v. Board of Education</i> , 880 F.2d 305 (11th Cir. 1989).....	19
<i>Arnold v. Jones</i> , 891 F.2d 1370 (8th Cir. 1989) .....	19
<i>Associated Gen. Contractors v. California State Council</i> , 459 U.S. 519 (1983) .....	27
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1975) .....	33
<i>Branch v. Tunnell</i> , 937 F.2d 1382 (9th Cir. 1991) .....	19
<i>Brown v. Inhabitants of Vinalhaven</i> , 65 Me. 402 (1876) .....	14
<i>Bryan v. Stillwater Board of Realtors</i> , 578 F.2d 1319 (10th Cir. 1977).....	26
<i>Burlington Northern Railroad Co. v. Woods</i> , 480 U.S. 1 (1987) .....	36
<i>Business Guides, Inc. v. Chromatic Communications Enter., Inc.</i> , 111 S. Ct. 922 (1991).....	36
<i>Challenger v. Local Union No. 1 of Intern. Bridge, Structural, and Ornamental Iron Workers, AFL-CIO</i> , 619 F.2d 645 (7th Cir. 1980).....	25
<i>Chongris v. Board of Appeals</i> , 811 F.2d 36 (1st Cir.), cert. denied, 483 U.S. 1021 (1987) .....	27
<i>City of Canton v. Harris</i> , 489 U.S. 378 (1989) 9, 10, 11, 21	
<i>City of Corsicana v. White</i> , 57 Tex. 382 (1882) .....	15
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985) .....	10, 11, 12, 18

## TABLE OF AUTHORITIES - Continued

## Page

<i>City of Richmond v. Long's Adm'rs.</i> , 17 GRATT. 375 (Va. 1867) .....	14, 15
<i>City of Springfield v. Kibbe</i> , 480 U.S. 257 (1987)....	17, 18
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112 (1988) .....	9
<i>Collinson v. Gott</i> , 895 F.2d 994 (4th Cir. 1990).....	18
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957) .....	26, 27
<i>Dartmouth Review v. Dartmouth College</i> , 889 F.2d 13 (1st Cir. 1989) .....	22, 23, 27
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) .....	19, 20, 33, 36
<i>Fisher v. Flynn</i> , 598 F.2d 663 (1st Cir. 1979).....	18
<i>Fowle v. Common Council of Alexandria</i> , 3 Pet. U.S.R. 398.....	15
<i>Fox v. The Northern Liberties</i> , 3 Watts & S. 103 (Pa. 1841).....	15, 16
<i>Hall v. Pennsylvania State Police</i> , 570 F.2d 86 (3rd Cir. 1978) .....	18
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965) .....	35, 36
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	16, 19, 33
<i>Harrison v. City of Columbus</i> , 44 Tex. 418 (1876).....	15
<i>Hayes v. City of Oshkosh</i> , 33 Wis. 314 (1873) .....	15
<i>Heard v. Houston Post Company</i> , 684 S.W.2d 210 (Tex. Civ. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.) .....	32
<i>Intbler v. Pachtman</i> , 424 U.S. 409 (1976) .....	16
<i>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit</i> , 954 F.2d 1054 (5th Cir. 1992).....	17



## TABLE OF AUTHORITIES – Continued

Page

<i>McGregor v. Industrial Excess Landfill, Inc.</i> , 856 F.2d 39 (6th Cir. 1988).....	24
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	16, 33
<i>Mitchell v. King</i> , 537 F.2d 385 (10th Cir. 1976) .....	26
<i>Monell v. Department of Social Services of New York</i> , 436 U.S. 658 (1978).....	9, 12, 16, 17
<i>Morrison v. City of Baton Rouge</i> , 761 F.2d 242 (5th Cir. 1985) .....	36
<i>Mower v. Inhabitants of Leicester</i> , 9 Mass. 247 (1812) ....	14
<i>Nuclear Transport &amp; Storage, Inc. v. United States</i> , 890 F.2d 1348 (6th Cir. 1989).....	19
<i>Owen v. City of Independence</i> , 445 U.S. 621 (1980) .....	13, 16, 17, 20
<i>Palmer v. City of San Antonio</i> , 810 F.2d 514 (5th Cir. 1987).....	17, 18
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469 (1986) .....	9
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967) .....	13, 16
<i>Pueblo Neighborhood Health Centers, Inc. v. Losavio</i> , 847 F.2d 642 (10th Cir. 1988).....	19
<i>Rakovich v. Wade</i> , 850 F.2d 1180 (7th Cir.), cert. denied, 488 U.S. 968 (1988).....	19
<i>Reock v. Mayor and Council of Newark</i> , 33 N.J.L. Reports 129 (1868).....	15
<i>Rodriguez v. Avila</i> , 871 F.2d 552 (5th Cir.), cert. denied, 493 U.S. 854 (1989).....	20
<i>Rutman Wine Co. v. E. &amp; J. Gallo Winery</i> , 829 F.2d 729 (9th Cir. 1987).....	25
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964).....	28

## TABLE OF AUTHORITIES – Continued

Page

<i>Sibbach v. Wilson &amp; Co.</i> , 312 U.S. 1 (1941) .....	36, 37
<i>Siegert v. Gilley</i> , 895 F.2d 797 (D.C. Cir. 1990), <i>aff'd</i> , 111 S. Ct. 1789 (1991) .....	18, 20
<i>Snowden v. Hughes</i> , 321 U.S. 1 (1944).....	27
<i>Spear v. Town of West Hartford</i> , 954 F.2d 63 (2nd Cir. 1992).....	18
<i>Strauss v. City of Chicago</i> , 760 F.2d 765 (7th Cir. 1985).....	23, 27, 33
<i>Sutliff, Inc. v. Donovan Companies, Inc.</i> , 727 F.2d 648 (7th Cir. 1984).....	24
<i>Sutton &amp; Dudley v. Board of Police of Carroll County</i> , 41 Miss. 236 (1866) .....	15
<i>Tamari v. Bache &amp; Co. (Lebanon) S.A.L.</i> , 565 F.2d 1194 (7th Cir. 1977), cert. denied, 435 U.S. 905 (1978) .....	25
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951).....	13, 14, 16
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975) .....	27, 28
<i>Western College of Homeopathic Medicine v. City of Cleveland</i> , 12 Ohio St. 375 (1861).....	15
<i>Western Mining Council v. Watt</i> , 643 F.2d 618 (9th Cir.), cert. denied, 454 U.S. 1031 (1981).....	25
<i>Wheeler v. City of Cincinnati</i> , 19 Ohio St. 19 (1869) ....	15
STATUTES, CODES AND OTHER AUTHORITIES	
28 U.S.C. § 2072.....	<i>passim</i>
42 U.S.C. § 1983.....	<i>passim</i>
42 U.S.C. §§ 6972, 6973 .....	24

## TABLE OF AUTHORITIES -- Continued

	Page
42 U.S.C. §§ 9606, 9607(a).....	24
FED. R. CIV. P. 8 .....	<i>passim</i>
FED. R. CIV. P. 56 .....	2, 6
Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1992) .....	31
Open Records Decision No. 511 (1988) .....	32
Douglas A. Blaze, <i>Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation</i> , 31 Wm. & Mary L. Rev. 935 (1990) .....	30

## STATUTES AND RULES INVOLVED

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

(e) **Pleading to be Concise and Direct: Consistency.** (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

The Rules Enabling Act, 28 U.S.C. § 2072, provides in pertinent part:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. . . .

### STATEMENT OF THE CASE

Petitioners Charlene Leatherman and Kenneth Leatherman, individually and as next friends of Travis Leatherman (collectively referred to as the "Leatherman plaintiffs"), alleged, in their original petition filed in state district court in Tarrant County, Texas, *inter alia*, that Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU") and Tarrant County, Texas ("Tarrant County") violated their constitutional rights in connection with their alleged detention and arrest by Respondents and Respondents' search of their residence (the "Leatherman incident").

After removal of the case to the Northern District of Texas, Fort Worth Division, the district court considered a motion filed by these two Respondents pursuant to Rules 12(b)(6) and 56, FED. R. CIV. P., to dismiss the original complaint. The district court, the Honorable David O. Belew, Jr. presiding, dismissed the complaint for failure to "allege any custom, practice or usage from which a policy may be inferred," but later vacated the dismissal and provided the Leatherman plaintiffs with additional time to amend to cure the inadequacies.

In order to attempt to cure the deficiencies in their complaint, the Leatherman plaintiffs added as additional plaintiffs Gerald Andert, Kevin Andert, Kevin Lealos and Jerri Lealos, individually and as next friends of Tavor and Shane Lealos, Pat Lealos, and Donald Andert (collectively referred to as the "Andert plaintiffs"). They also added as new defendants Tim Curry ("Curry") and Don Carpenter ("Carpenter"), in their official capacities as Director of TCNICU and Sheriff of Tarrant County,

respectively, the City of Lake Worth, Texas ("Lake Worth"), and the City of Grapevine, Texas ("Grapevine"). Petitioners alleged that the Andert plaintiffs' residence was subjected to a search by officers of TCNICU and Grapevine (the "Andert incident"), which was similar to the Leatherman incident. Petitioners added the Andert incident in an apparent attempt to show that the Leatherman incident was not an isolated incident, so as to establish the existence of a governmental policy of unreasonable searches by TCNICU and Tarrant County.

Regardless of whether the addition of the Andert incident suggests any policy by TCNICU or Tarrant County, it did not support such an allegation against Lake Worth, because there was no allegation that Lake Worth had any involvement in the Andert incident, which occurred in the City of Grapevine. The allegations as to Lake Worth stemmed solely from the Leatherman incident. With regard to Lake Worth, Petitioners' First Amended Complaint (the "Complaint") alleged in relevant part:

The search of the Leathermans' home was planned and carried out by law enforcement officers employed by or under the control of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth.

(Complaint Paragraph 17) Petitioners thereafter alleged that:

the shooting of their family dogs on the occasion in question by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their effects against unreasonable



seizure as protected by the Fourth Amendment to the United States Constitution.

(Complaint Paragraph 21) and that:

the manner in which the search of their home was carried out by agents of Defendant TCNICU, Defendant Tarrant County and Defendant City of Lake Worth, deprived them of their right to be secure in their house against unreasonable searches as protected by the Fourth Amendment to the United States Constitution.

(Complaint Paragraph 22) The Complaint set forth absolutely no factual allegations regarding Lake Worth's alleged participation in any actions which allegedly constituted an invasion of the Leatherman plaintiffs' constitutional rights. Based solely upon the above allegations, the Leatherman plaintiffs asserted, in conclusory allegations only, that:

Defendant City of Lake Worth is liable to [the Leatherman plaintiffs] pursuant to 42 U.S.C. § 1983 for the unreasonable seizure of Plaintiffs' effects, i.e., the unjustified shooting of Plaintiffs' dogs, as alleged in paragraph 21 of this First Amended Complaint. Specifically Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of

Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violations alleged in paragraph 21.

(Complaint Paragraph 25) The Leatherman plaintiffs further asserted that:

Defendant City of Lake Worth is liable to [the Leatherman plaintiffs] pursuant to 42 U.S.C. § 1983 for the unreasonable search of Plaintiffs' house as alleged in paragraph 22 of this First Amended Complaint. Specifically, Plaintiffs allege that the actions of the agents of Defendant City of Lake Worth were undertaken under color of State law; that Defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Lake Worth by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Plaintiffs further allege that the failure to train referred to in this paragraph was a substantial factor or cause of the violation alleged in paragraph 22.

(Complaint Paragraph 28) Petitioners made no other allegations as to Lake Worth in the Complaint.

TCNICU, Tarrant County, Curry, and Carpenter filed a motion to dismiss pursuant to Rule 12(b)(6) or, alternatively, for summary judgment, pursuant to Rule 56, and the district court, the Honorable John McBryde presiding, dismissed the Complaint as to all the defendants. The district court noted that Petitioners still had pled the existence of a custom or policy only in the most conclusory terms, and had not informed the Respondents as to what training policy the Respondents had allegedly failed to implement. The district court further noted that Petitioners failed to provide any allegation as to how the Respondents had been "deliberately indifferent" to the Petitioners' constitutional rights. For these reasons, the district court determined that dismissal was appropriate.

The district court also ruled that, assuming dismissal was not proper, summary judgment under Rule 56, FED. R. Civ. P., was appropriate, given that Petitioners had failed to come forward with any evidence whatsoever that any of the actions alleged to have been taken by the officers in question were taken because of the existence of governmental policy or custom.

Petitioners' defense to summary judgment was that they should be granted more time to discover the existence of such a policy. The district court was not persuaded by Petitioners' argument, ruling that Petitioners had been provided sufficient time for discovery, and that, in order to justify the initial filing of their action, they should have been able to identify some facts which would have warranted a conclusion that such a policy

existed, since that is one of the predicates to stating a valid action under 42 U.S.C. § 1983.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on the grounds that the Complaint failed to allege any specific facts to support Petitioners' claims that the Respondents had a policy of inadequate training, as required by the heightened pleading requirement adopted by the Fifth Circuit in civil rights actions. It expressly did not address the remainder of the reasons for the district court's dismissal.

---

#### SUMMARY OF THE ARGUMENT

The dismissal of Petitioners' cause of action as to Lake Worth should be upheld because the Complaint failed to meet the constraints of Federal Rule of Civil Procedure 8(a), either as applied by the Fifth Circuit utilizing the heightened pleading requirement applied in civil rights cases, or as applied in other cases.

The Complaint contained only a conclusory allegation that the actions complained of were taken pursuant to a policy of Lake Worth. The existence of a municipal policy which causes a constitutional deprivation is a necessary element of a claim under 42 U.S.C. § 1983 brought against a municipality. Without a showing of the existence of such a policy, a municipality enjoys not only immunity from liability, but also immunity from suit. Thus, the Complaint against Lake Worth was properly dismissed because the Complaint did not show the existence of such a policy.

The Fifth Circuit's holding does not conflict with Federal Rule of Civil Procedure 8(a) because Rule 8(a) expressly provides that a plaintiff must include in the complaint a statement of the claim showing that the plaintiff is entitled to relief. Merely including conclusory allegations tracking the elements of a cause of action does not show that a plaintiff is entitled to relief, and such conclusory allegations have consistently been held to be deficient under Rule 8 and subject to dismissal.

Nor does the Fifth Circuit's holding violate the Rules Enabling Act, 28 U.S.C. § 2072, because the Fifth Circuit's holding in no way abridges Petitioners' substantive legal rights. Rather, it simply applies procedural requirements placed upon a plaintiff for stating a cause of action under 42 U.S.C. § 1983. In fact, any result other than dismissal would have violated the Rules Enabling Act. Were Petitioners able to subject Lake Worth to suit without showing the existence of an unconstitutional policy, Lake Worth's substantive legal right to sovereign immunity would be destroyed, in direct contravention of the dictates of the Rules Enabling Act that no procedural rule may alter, abridge or modify substantive law.

---

## ARGUMENT

### 1. Municipal liability under 42 U.S.C. § 1983 is limited to actions taken pursuant to municipal policy.

A municipality is liable under 42 U.S.C. § 1983 only when the municipality itself has violated a person's constitutional rights pursuant to an official policy statement,

ordinance, regulation or decision. *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). Under *Monell*, recovery from a municipality is limited to acts "of the municipality." *Id.* at 694. A municipality may be held liable only for acts which it has officially sanctioned or ordered, not for isolated acts of misconduct, no matter how egregious. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Thus, a municipality may not be held liable under § 1983 unless a plaintiff establishes the existence of a municipal policy which is a moving force behind a constitutional violation. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Based upon these established precedents, in order for Petitioners to state a claim against Lake Worth, they must adequately plead the existence of a specific policy adopted by Lake Worth which caused a constitutional deprivation.

### 2. The Complaint failed to show the existence of a municipal policy.

The Complaint failed to show the existence of a policy which had been formally adopted by or officially sanctioned or ordered by any policy makers of Lake Worth. Petitioners pled that the search of the Leatherman residence was planned and carried out by law enforcement officers employed by or under the control of Respondents TCNICU, Tarrant County and Lake Worth. Nowhere in the Complaint were there any allegations of actions which were allegedly carried out specifically by officers of Lake Worth. There are no allegations that Lake Worth's officers, as opposed to officers of TCNICU or



Tarrant County, entered and searched the Leathermans' residence. There are no specific allegations that Lake Worth's officers shot the Leathermans' dogs during the search. There are simply no allegations of any specific involvement by Lake Worth in the Leatherman incident.

Moreover, there was no showing of the existence of any municipal policy of Lake Worth. Instead, Petitioners stated in conclusory fashion only that Lake Worth failed to formulate and implement an adequate policy to train its officers and that this failure to train demonstrated deliberate indifference to the rights of persons likely to be affected by such failure to train. This is insufficient to state a cause of action based upon a failure to train.

This Court has specifically noted that there are only "limited circumstances" in which an allegation of failure to train can be the basis for liability under § 1983. *Harris*, 489 U.S. at 387. Inadequate police training "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. Plaintiff has attempted to state a cause of action against Lake Worth by quoting the above language verbatim from this Court's decision in *Harris*. The use of such conclusory generalities based upon a single isolated incident of harm does not sufficiently allege a policy based upon a failure to train. Rather, the necessary requisites to establish the existence of a policy of inadequate training were established by this Court in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, this Court specifically rejected the premise that a municipal policy imputing liability could be inferred from a single isolated act by a police officer. Yet Petitioners attempted to do just that – they

sought to create an *inference* that a single isolated incident constitutes a municipal policy of inadequate training. Nowhere in their pleadings did Petitioners allege any other incidents which could have formed the basis for Lake Worth's purported policy of failure to train its officers on the proper method of search or the proper method of handling an encounter with dogs.<sup>1</sup> This Court's decision in *Harris* that a municipality may be liable for deliberate indifference does not overrule or modify the conclusion in *Tuttle* that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824.

Further, the Complaint failed to allege that the asserted "policy" reflected a deliberate or conscious choice by the policy makers of Lake Worth. "Municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the city policy makers." *Harris*, 489 U.S. at 389. This is consistent with the holding that an unjustified shooting by a police officer, without more, does not result from official policy. In

---

<sup>1</sup> As stated previously, in the Complaint Petitioners added a separate and distinct incident (the Andert incident) involving the Grapevine Police Department, apparently in an attempt to show the existence of a policy. The Complaint, however, clearly acknowledges that no Lake Worth officers were present or participated in the Andert incident, and therefore, the Complaint as to Lake Worth only states a single isolated incident.

so holding, the *Tuttle* court noted that "it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice – that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. at 823. Though the *Tuttle* court was referring to proof and not pleading, the same logic applies, so that a plaintiff is required to at least plead that there was more than one incident, and to allege how such incidents were attributable to a policy of a failure to train, in order to give a municipal defendant fair notice of how it is allegedly liable for conduct which otherwise would be insufficient to state a claim against the municipality. This is true in particular because, as discussed below, in the absence of a properly pled municipal policy, a city is entitled to sovereign immunity, including immunity from suit.

**3. Municipalities are entitled to sovereign immunity from § 1983 lawsuits in the absence of the existence of a municipal policy.**

In *Monell*, this Court stated, "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690. The Court therefore concluded that local governing bodies may be sued under § 1983 where " . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or

decision officially adopted and promulgated by that body's officers." *Id.* at 690. Municipal liability under *Monell* is thus limited to actions of a municipality taken pursuant to "policy" or "custom." Nowhere in *Monell* did this Court abrogate the doctrine of common law sovereign immunity as it applied to municipalities at the time the Civil Rights Act was adopted in 1871.

The application of common law immunity defenses to § 1983 causes of action against municipalities was discussed by this Court in *Owen v. City of Independence*, 445 U.S. 621 (1980). The *Owen* court noted that principles of common law immunity had been recognized and upheld in civil rights challenges brought against legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and judges and police officers, *Pierson v. Ray*, 386 U.S. 547 (1967). *Owen*, while denying municipalities a *qualified immunity* defense based upon the good faith of its officers, indicated that in the absence of a municipal policy, no waiver of common law immunities would occur. The *Owen* court noted that:

[n]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine. *Pierson*, 386 U.S. at 555. Thus in *Tenney v. Brandhove*, *supra*. . . . we concluded that Congress 'would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language' of § 1983. . . .

Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.

445 U.S. 621, 637-638 (quoting *Tenney v. Brandhove*, 341 U.S. at 376). As discussed below, the doctrine of sovereign immunity, as applied to a municipality's governmental functions, was well established at the time of the Civil Rights Act of 1871.

Early on in the American judicial system, it was recognized that the "well settled" common law did not allow suit against a municipality: "[Municipal] corporations, created by the legislature for purposes of public policy, . . . by the common law, . . . are not liable to an action for . . . neglect unless the action be given by some statute. *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 250 (1812). See also, *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, 403 (1876) (the general rule is that municipal corporations are not liable to a suit except when the right of action is given by statute). Under this doctrine of common law immunity, municipalities were deemed to be public corporations which constituted "a part of the government of the country." *City of Richmond v. Long's Adm'rs.*, 17 GRATT. 375, 378 (Va. 1867). In holding that a demurrer should have been granted in favor of the city on the grounds of sovereign immunity, the *Long's Adm'rs.* court noted:

The legislature of the state has thus chosen to impart to this corporation the highest attributes and functions of political sovereignty, so that it

is 'imperium in imperio,' and may be aptly termed in the language of Judge Marshall already quoted, 'a legislative corporation, established as a part of the government of the country.' It cannot be denied that it is as well a municipal government as a municipal corporation.

17 GRATT. at 383 (quoting *Fowle v. Common Council of Alexandria*, 3 Pet. U.S.R. 398). State courts during this era routinely dismissed civil rights and other causes of action against municipalities on demurrer or similar motions on the basis of governmental immunity. See, e.g., *Harrison v. City of Columbus*, 44 Tex. 418 (1876); *City of Corsicana v. White*, 57 Tex. 382 (1882); *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375 (1861); *Sutton & Dudley v. Board of Police of Carroll County*, 41 Miss. 236 (1866); *Hayes v. City of Oshkosh*, 33 Wis. 314 (1873); *Reock v. Mayor and Council of Newark*, 33 N.J.L. Reports 129 (1868). Other state court decisions interpreted the doctrine of sovereign immunity to prohibit causes of action against a municipality based on the acts of its officers. *Fox v. The Northern Liberties*, 3 Watts & S. 103 (Pa. 1841); *Wheeler v. City of Cincinnati*, 19 Ohio St. 19 (1869). Thus in *Fox*, the Pennsylvania Supreme Court noted:

[N]or is it conceivable how any blame can be fastened upon a municipal corporation, because its officer, who is appointed or elected for the purpose of causing to be observed and carried into effect the ordinances duly passed by the corporation for its police, either mistakenly or wilfully, under colour of his office, commits a trespass; for in such case it cannot be said, that the officer acts under any authority given to



him, either directly or indirectly by the corporation . . .

*Fox*, 3 Watts & S. at 106.

A century later, but consistent with these authorities, the *Owen* court specifically noted that "the common law immunity for governmental functions is thus more comparable to an *absolute immunity from liability* for conduct of a certain character, *which defeats a suit at the outset*, than to a qualified immunity, which depends upon the circumstances and motivations of [the official's] actions, as established by the evidence at trial." 445 U.S. at 647, n.29 (citing *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976)) (emphasis added).

This Court followed the logic espoused in *Owen*, *Tenney* and *Pierson* when it rendered its landmark opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), holding that government officials generally are shielded from liability in civil rights lawsuits insofar as their conduct does not violate clearly established law. *Harlow* and its progeny clearly recognize that significant policy considerations exist for not subjecting government officials entitled to qualified immunity to the costs, burdens and fears of being sued. As a basis for these rulings, this Court has emphasized that good faith immunity embraces not only a defense to personal liability, but also an "immunity from suit." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The conclusions in *Harlow* and *Mitchell* that mere allegations of wrongdoing will not defeat a claim of good faith immunity and that qualified immunity includes immunity from suit, are similar to this Court's recognition in *Monell* that "a local government may not be sued under

§ 1983" unless the unconstitutional deprivation can be attributed to municipal policy. *Monell*, 436 U.S. at 694 (emphasis added). *Owen* likewise acknowledged that sovereign immunity for a municipality is immunity from suit, except to the extent that such immunity has been abrogated by the adoption of § 1983. The *Owen* majority specifically noted that "the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" 445 U.S. at 657 (citing *Monell*, 436 U.S. at 694).

**4. The Fifth Circuit's application of a "heightened pleading" requirement under Rule 8 is appropriate in cases such as the one at bar.**

Based upon the above precedents, Petitioners were required to plead facts sufficient to show a waiver of Lake Worth's governmental immunity. The Fifth Circuit analyzed Petitioners' "bare bones" statements and determined that they were, at best, mere conclusory allegations which were not sufficient to sustain a § 1983 cause of action against Lake Worth. In so doing, the Fifth Circuit applied a "heightened pleading" standard. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992). Under Fifth Circuit authority, a complaint against a municipality must specifically identify: (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). This

standard is in accordance with Supreme Court precedent. "It is only when the execution of [the] government's policy or custom . . . inflicts the injury that the municipality may be held liable under § 1983." *City of Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting) (quoting *Monell*, 436 U.S. at 694). Even assuming *arguendo* that Petitioners' allegations were sufficient to allege specific acts by the police officers of Lake Worth, under *Tuttle*, the Fifth Circuit has properly held that where a lawsuit brought against a municipality is predicated on inadequate training of its police officers, there has to be shown at least a pattern of similar incidents in which citizens were injured in order to establish the official policy requisite to impose municipal liability under § 1983. *Palmer*, 810 F.2d at 518. Since Petitioners only alleged that Lake Worth police officers were involved in a single incident, and since there was no other allegation supporting the existence of a policy, the minimum requirements for stating a claim clearly were not met.

Petitioners' argument that the Fifth Circuit's "heightened pleading" requirement violates Rule 8 has no merit. The Fifth Circuit rule is consistent with precedents of all other circuit courts of appeals. Whether they have articulated the rule as a "heightened pleading" standard, or simply as application of the requirements of Rule 8, all of the circuits have applied a similar pleading requirement in civil rights cases. See, e.g., *Siebert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd*, 111 S. Ct. 1789 (1991) (adopting heightened pleading requirement); *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979) (civil rights complaints must do more than state simple conclusions); *Spear v. Town of West*

*Hartford*, 954 F.2d 63 (2nd Cir. 1992) (civil rights complaints containing only bare assertions that are conclusory and speculative will be dismissed); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990) (adopting heightened pleading requirement); *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) (adopting heightened pleading requirement); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989) (adopting heightened pleading requirement); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988) (mere conclusory allegations are insufficient to state claim); *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989) (adopting heightened pleading requirement); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (adopting heightened pleading requirement); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988) (adopting heightened pleading requirement); *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989) (Rule 8 is applied more rigidly to claims alleging official policy or custom of a local government). Each of these cases reflects the recognition that stricter pleading and proof requirements are inherently necessary to fulfill the substantive legal purposes of absolute and qualified immunity defenses.

A heightened pleading requirement is also consistent with this Court's holdings. For example, a heightened pleading requirement has been applied to § 1983 qualified immunity defenses pursuant to this Court's rulings in *Harlow* and *Anderson v. Creighton*, 483 U.S. 635 (1987), recognizing the applicability of "objective" immunity tests in order to protect governmental officials from the

burdens of trial and litigation. *See, e.g., Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985); *Siegert v. Gilley*, 895 F.2d 797 (D.C. 1990). The justifications for protecting individual officers entitled to qualified immunity from costs and burdens of unfounded lawsuits are equally applicable to governmental entities entitled to absolute immunity. As noted in Justice Powell's dissent in *Owen*, a paralysis of governmental decision-making may occur if responsible local officials, concerned about potential judgments against their municipalities for alleged constitutional torts, must look over their shoulders at strict municipal liability for unknowable constitutional violations. 445 U.S. at 668-69. With the tremendous costs and burdens of defending civil rights litigation, the same result will likely occur even though the plaintiff's allegations may ultimately be adjudged to be without merit.

The heightened pleading requirement adopted by the Fifth Circuit simply enforces these policy considerations by ensuring that lawsuits brought against governmental entities entitled to sovereign immunity from suit have some viable basis supported by factual averments. Just as in cases of qualified immunity, where a mere conclusory allegation of bad faith is not sufficient to defeat a government official's qualified immunity, a complaint against a governmental entity must meet a simple basic threshold in order to state a claim under § 1983 – specifically, a factual predicate supporting the alleged existence of a municipal policy. *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir.), *cert. denied*, 493 U.S. 854 (1989). To adopt any other rule would eviscerate the immunity from suit that governmental entities have under the law, because a plaintiff could simply file a complaint alleging the existence of a

policy, without any factual basis supporting the existence of such a policy, in the blind hope of discovering through suit some evidence upon which to base a claim or of exacting a settlement from a city desiring to avoid the costs of litigation. Such a result is inconsistent with the existence of sovereign immunity.

It is also inconsistent with this Court's previously adopted position that a claim against a municipality is not established "by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible." *Harris*, 489 U.S. at 389. For liability to attach, the "identified deficiency in a city's training program must be closely related to the ultimate injury." *Id.* at 391 (emphasis added). Under *Harris*, a cause of action for "inadequate training" should inherently require pleading and proof of three basic elements:

- 1) A showing of how the alleged "policy" is inadequate to protect against the deprivation of a constitutional right;
- 2) A showing that the governmental entity's policy makers deliberately or consciously sanctioned the inadequate policy because they knew that it was inadequate in the manner alleged and they acted with conscious indifference to whether the policy would deprive citizens of a constitutional right; and
- 3) A showing that the constitutional deprivation was actually caused by the deficiency in training and that the injury would not have occurred under an adequate training program.



Under this test, the pleading of a factual basis supporting a theory of "conscious indifference" is necessary to sustain a claim of municipal liability. Petitioners wholly failed to meet this burden in that they failed to plead what Lake Worth's policy on training was or how it allegedly violated their constitutional rights. Until this threshold is crossed, no issue has been raised as to whether Lake Worth's policy makers (whose identity Petitioners have also failed to plead) acted with conscious indifference to the rights of citizens or whether such indifference was a moving force behind the injury.

**5. Application of the "heightened pleading" requirement is not necessary to sustain dismissal of Petitioners' claim against Lake Worth.**

Even assuming that application of a "heightened pleading" requirement is not warranted, dismissal of the Complaint against Lake Worth was still appropriate. Rule 8 generally allows "notice pleadings," but Rule 8 still requires a party to plead some facts in support of their alleged claim. Numerous courts of appeals have addressed this issue, and virtually all are in agreement that the liberality of the federal rules do not eliminate the need for a plaintiff to plead his case sufficiently. Moreover, these courts have so reasoned without any application of a "heightened pleading" standard. For example, the First Circuit has recognized that although Rule 8 allows "notice pleading," it does not relieve a plaintiff from providing some showing of the basis for its claim. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989). In so ruling, the court noted that the liberal

provisions of Rule 8 are still subject to the dictates of Rule 12(b)(6):

We have repeatedly cautioned that, notice pleadings notwithstanding, Rule 12(b)(6) is not entirely a toothless tiger. "[M]inimal requirements are not tantamount to nonexistent requirements. The threshold [for stating a claim] may be low, but it is real . . ." [citation omitted]. Thus, plaintiffs are obliged to set forth in their complaint factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory. [citation omitted]

*Id.* at 16.

Similarly, the Seventh Circuit has held in a civil rights action brought under § 1983 that while courts must construe pleadings liberally, and mere vagueness or lack of detail does not warrant dismissal, the lack of intimation of any facts supporting the existence of a municipal policy, custom or usage justifies dismissal. The court noted that mere legal conclusions of liability and the existence of a municipal policy will not suffice to comply with Rule 8. *Strauss v. City of Chicago*, 760 F.2d 765, 767-68 (7th Cir. 1985). In so holding, the court expressly elected not to apply a heightened pleading standard, stating: "We do not mean to imply that a plaintiff must plead in greater detail, but merely that the plaintiff must plead some fact or facts tending to support his allegation that a municipal policy exists that could have caused his injury." *Id.* at 769.

It is clear that the courts' reasoning in *Dartmouth* and *Strauss* were not based upon the fact that they were civil

rights cases, because similar analysis has been consistently applied in other types of cases. For example, the Sixth Circuit affirmed dismissal under Rule 8(a) of a cause of action brought pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6972, 6973 and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607(a). *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39 (6th Cir. 1988) (per curiam). In so holding, the court noted that the plaintiffs had alleged that they had incurred certain "response costs," a necessary predicate to an action under CERCLA. The Sixth Circuit rejected the plaintiffs' argument that this was a sufficient pleading under Rule 8(a), noting that Rule 8(a) at least requires that the plaintiff include a short and plain statement of the claim showing that the pleader is entitled to relief, and that this requires that the plaintiff give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The court stated that implicit in this requirement is a statement of the circumstances, occurrences and events upon which the claim is based. The court pointed out that the plaintiffs' complaint failed to allege any factual basis for the conclusory allegation that they had incurred response costs, and accordingly affirmed the dismissal.

Likewise, the Seventh Circuit has stated that, despite the liberality of modern rules of pleading, a complaint still must contain allegations of fact, direct or inferential, respecting all of the elements of the plaintiff's claim. *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984). The court added:

And the pleader will not be allowed to evade this requirement by attaching a bare legal

conclusion to the facts that he narrates: if he claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust.

*Id.* at 654. See also, *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194, 1198 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978); and *Challenger v. Local Union No. 1 of Intern. Bridge, Structural, and Ornamental Iron Workers, AFL-CIO*, 619 F.2d 645, 648-49 (7th Cir. 1980). In *Challenger*, the court determined that allegations that the defendants had breached their fiduciary duties, which allegations were being used to support a cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381, were insufficient and warranted dismissal. The court noted that the bald conclusion that the defendants had breached their fiduciary duty was insufficient, because a motion to dismiss admits allegations of fact, but not legal conclusions. *Challenger*, 619 F.2d at 649.

The Ninth Circuit has also adopted a similar position regarding the proper construction of Rule 8. For example, in a case wherein the plaintiffs sought a declaratory judgment rendering the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782, unconstitutional, the court affirmed dismissal under Rule 12(b)(6), stating that the court will not presume the truth of a legal conclusion in the complaint, and that the plaintiff is required to plead factual allegations in support of its claim. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981). See also, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987).

The Tenth Circuit has construed Rule 8 in the same fashion, noting that on a motion to dismiss, facts that are well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged to support them. *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977). See also, *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976).

In none of these cases did the courts' holdings turn on application of a "heightened pleading" requirement. Instead, the courts were guided by the language of Rule 8 itself, which imposes a duty on the plaintiff to include in the Complaint a short and plain statement of the claim showing that the pleader is entitled to relief. Petitioners' pleadings in this case did not show that they were entitled to relief. Instead, Petitioners did nothing more than track the verbatim language from one of this Court's prior cases enumerating the prerequisites for bringing a § 1983 claim. As previously pointed out, Petitioners alleged no facts supporting the passage or implementation of a policy, and also failed to allege any series of incidents involving Lake Worth which could arguably have supported an inference of the existence of a municipal policy. Thus, they accorded Lake Worth absolutely no notice whatsoever as to the nature of the claim, and failed to comply with the minimum dictates of Rule 8.

Petitioners argue that requiring them to plead in non-conclusory terms is inconsistent with this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). This is not so. Indeed, these same courts of appeals have consistently evidenced their consideration of *Conley*, and have noted this Court's careful analysis that the Rules of Civil Procedure:

[d]o not require a claimant to set out *in detail* the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

*Conley*, 355 U.S. at 47 (emphasis added). See, e.g., *Strauss*, 760 F.2d at 767-68; *Dartmouth*, 889 F.2d at 16. This Court's discussion in *Conley* has been virtually universally interpreted to require a court to accept all well-pled factual averments as true, and draw all reasonable inferences therefrom in a plaintiff's favor. In so doing, however, the courts must eschew any reliance on bald assertions, unsupportable conclusions, and opprobrious epithets. *Dartmouth*, 889 F.2d at 16; *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), cert. denied, 483 U.S. 1021 (1987) (quoting *Snowden v. Hughes*, 321 U.S. 1, 10 (1944)).

Decisions of this Court since *Conley* also indicate that Rule 8 does not eliminate the need for a plaintiff to come forward with at least a minimal showing of factual support for a claim. For instance, this Court has stated in an antitrust case that the liberal pleadings rule stated in *Conley* can perhaps be stretched too far, and that, at least in a case of great magnitude, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors v. California State Council*, 459 U.S. 519, 528 n.17 (1983). Similarly, in affirming a dismissal for lack of standing in an exclusionary zoning case, this Court noted that the plaintiffs had alleged only in conclusory terms that they were among the persons excluded by the defendants' actions. *Warth v.*



*Seldin*, 422 U.S. 490 (1975). Such conclusory statements were held insufficient. Instead, the Court stated:

[P]etitioners must allege facts from which it reasonably could be inferred that, absent the respondents' . . . practices, there is a substantial probability that they would have been able to purchase or lease in Penfield . . . We find the record devoid of the necessary allegations.

*Id.* at 504.

We hold only that a plaintiff who seeks to challenge . . . practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention.

*Id.* at 508.

In yet another case, this Court has held that a plaintiff cannot meet his burden under Federal Rule of Civil Procedure 35 (authorizing physical examination of a party) by making conclusory allegations. Rather, this Court held the rule required a plaintiff to plead facts, and that the requirements of the rules are not met by mere conclusory allegations. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). Thus, this Court has recognized that some facts supporting a plaintiff's claim must be pleaded, and that "pleadings must be something more than an ingenious academic exercise in the conceivable." *Warth*, 422 U.S. at 509.

The requirement that Petitioners must plead basic facts supporting the Complaint is also confirmed by the form complaints drafted by the Advisory Committee on the Federal Rules. For example, Form 9, a form complaint

for a negligence action, suggests inclusion of specific facts supporting a claim, including the date and location of the accident, a brief description of the accident itself, and articulation of the types of injuries suffered by the plaintiff. Thus, the form requires that the defendant be provided with factual support for the elements of the plaintiff's claim.

This requirement is in harmony with the purposes of the Federal Rules of Civil Procedure. While generally pleadings should not be used to determine the merits of a claim, courts should be free to use pleading requirements as a tool to expose the existence of a fatal defect in the plaintiff's case at the outset, especially in an area of litigation like civil rights actions, in which many cases are frivolous, and the defendant is entitled not to be sued at all in the absence of a governmental policy. This is particularly true given the overwhelming burden imposed on the courts by the flood of civil rights litigation.<sup>2</sup>

Petitioners maintain that Rule 11 is a sufficient safeguard against frivolous filings, since it mandates an investigation and a certification by a plaintiff's counsel that the case is well grounded in fact and law. Petitioners' argument stands the question on its head. The proper issue is not whether other provisions in the Federal Rules provide the courts with other tools to address the increase in meritless filings, but whether dismissal at the

---

<sup>2</sup> According to the Federal Judicial Workload Statistics, December 31, 1991, prepared by the Administrative Office of the United States Courts, civil rights cases, including prisoner petitions, comprised 47,986 of the 217,656 cases commenced in the federal courts during 1991, or over 22% of all cases filed.

pleadings stage is an appropriate tool to address the problem, and whether, under the facts of this case, dismissal was proper.

Moreover, Rule 11, while certainly one useful tool in controlling frivolous filings, is not a cure-all. It is of limited use against pro se litigants (who comprise a substantial percentage of civil rights plaintiffs), because of the district courts' natural reluctance to use it against those persons who are arguably less familiar with the rules of court. Second, monetary sanctions are little or no deterrent to indigent litigants. Third, and most importantly, sanctions are, by definition, remedial in nature, and do not operate to prevent abuses before they occur. Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 Wm. & Mary L. Rev. 935, 988 (1990). Thus, Petitioners' suggestion that Rule 11 eliminates the need for careful and prudent use of Rule 12(b) dismissals is less than compelling.

One might also argue that summary judgment is a preferable alternative to dismissal at the pleading stage. Certainly, summary judgment is a useful way to dispose of claims prior to trial, and its importance as a pre-trial procedural device cannot and should not be minimized. The availability of summary judgment does not necessarily lead to the conclusion, however, that it is the only mechanism to dispose of cases in which the plaintiff cannot even allege facts supporting his cause of action. Indeed, in the case at bar, resort to summary judgment would have produced the same result, but at a greater cost to Respondents and their taxpayers. Petitioners, who could not allege any facts to support the existence of a

municipal policy, would have been equally unable to do so on summary judgment. Thus, the only net effect of such an approach would have been to needlessly delay the inevitable, and to diminish Lake Worth's right to immunity from suit.

Petitioners complain that they should have been allowed to conduct discovery to gather evidence to support their claim. This argument cannot withstand careful scrutiny. First, Petitioners had ample time to conduct discovery from Lake Worth. The case against Lake Worth had been on file for seven months, and no protective order had been entered prohibiting such discovery against Lake Worth. (In fact, Petitioners took depositions of two Lake Worth officers prior to dismissal, and could have taken more had they so chosen).

Secondly, Petitioners were obligated to do an investigation before filing, and had several means to do so available. For example, they could have searched news accounts to determine if there were similar incidents in Lake Worth. Alternatively, they could have utilized the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1992), which permits access to government records. The Texas Open Records Act provides a very effective mechanism for plaintiffs to obtain, prior to filing suit, public documents which may reflect the existence of a municipal policy.<sup>3</sup>

---

<sup>3</sup> Contrary to Petitioners' intimations, the Texas Open Records Act is a very effective mechanism to obtain copies of almost any record within the possession of a governmental entity. The "litigation exception" to the Open Records Act noted by Petitioners may only be asserted after a lawsuit has been

Though Petitioners could have conducted a pre-filing investigation, and had a duty to do so under Rule 11, they clearly did not do so. Petitioners' position appears to be that they have an inherent right to plead a cause of action for which they have no factual basis to believe is true, based upon a single isolated incident, on the off-chance that they will be able, through a discovery fishing expedition, to find other incidents and thereby raise an issue as to the existence of an unconstitutional policy.

In fact, Petitioners' argument is exactly why dismissals should be granted early, especially in civil rights cases. Lake Worth is entitled to sovereign immunity. That immunity extends to immunity from the costs and burdens of suit, including unnecessary participation in motions or discovery. That immunity will be completely subverted and destroyed if a plaintiff can subject a city and its taxpayers to the costs and burdens of litigation based purely on an unsubstantiated allegation of the existence of a policy, which allegation is devoid of any factual support whatsoever. For example, this Court, in considering the similar qualified immunity available to many individual § 1983 defendants, has recognized that immunity from suit includes immunity from discovery:

Unless the plaintiff's allegations state a claim for violation of clearly established law, a

---

filed or if litigation is reasonably anticipated. *Heard v. Houston Post Company*, 684 S.W.2d 210 (Tex. Civ. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). The Texas Attorney General has therefore ruled that the litigation exception does not allow a municipality to withhold basic facts, the release of which would not impair the governmental body's legal strategy. Open Records Decision No. 511 (1988).

defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery*. . . . *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and *like an absolute immunity*, it is effectively lost if a case is erroneously permitted to go to trial.

*Mitchell v. Forsyth*, 472 U.S. at 526 (emphasis added). Applying this philosophy that one of the purposes of immunity is to protect governments from "broad ranging discovery" that can be "peculiarly disruptive of effective government, immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson*, 483 U.S. at 646 n.6 (emphasis added) (quoting *Harlow*, 457 U.S. at 818). Any other course of action effectively eviscerates the important functions and protections of official immunity. *Elliott*, 751 F.2d at 1476. The approach suggested by Petitioners would permit cities to be held hostage as captives in litigation, and would allow plaintiffs to extort settlements even on patently meritless claims, or to subject cities to extensive litigation in the blind hope of turning up some evidence to support the claims made. *Strauss*, 760 F.2d at 768.

This Court has previously recognized the dangers inherent in such misuse of the courthouse in the area of securities litigation. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (upholding the *Birnbaum* rule requiring a person to be a purchaser in order to maintain



an action for violation of the Securities Act of 1933). While the type of litigation was obviously different, the evil of a lawsuit brought solely for settlement value is exactly the same. Moreover, this Court recognized that the danger of abuse is enhanced due to the liberal discovery provisions of the Federal Rules:

[T]o the extent that [the discovery provisions permit] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

*Id.* at 741. In the face of this compelling logic, Petitioners maintain that they are legally entitled to go on a fishing expedition and troll the waters of the courthouse, casting their nets indiscriminately in the hope of "catching a big one." Unfortunately, such a rule would also result in the overburdening of the judicial system and the inconveniencing of numerous parties against whom the plaintiff has no colorable claim, who are then put to the expense of needlessly defending a case and responding to discovery while the plaintiff determines whether he has a case or not. Such a rule would not do "substantial justice," which is the stated goal of Rule 8. Dismissal of Petitioners' claim against Lake Worth was warranted, and should be affirmed.

**6. The holding of the Fifth Circuit does not violate the Rules Enabling Act, 28 U.S.C. § 2072.**

Petitioners' argument that the Fifth Circuit's holding violates the Rules Enabling Act is based upon their

conclusion that some meritorious claims will be affected. Petitioners cite no evidence or authority in support of this assertion, but even were that true, the decisions of this Court construing the Rules Enabling Act clearly demonstrate that the Petitioners' argument has no merit.

The Rules Enabling Act provides that no rule of procedure shall "abridge, enlarge or modify" any substantive right. Petitioners argue that the Fifth Circuit's ruling deprives them of their right to discovery. It is axiomatic that discovery rights are not substantive in nature, and therefore cannot be a basis for a Rules Enabling Act challenge, since the Rules Enabling Act prohibits modification only of substantive legal rights. Petitioners also maintain that because they could not do discovery (which assertion, with regard to Lake Worth, is patently inaccurate), they could not plead the elements of a claim and so were deprived of their right to such. Essentially, Petitioners argue that the Court must apply an outcome-determinative test – that if the rule of procedure arguably affects the result of the litigation, then it is invalid. This argument is meritless. Every rule of procedure is potentially outcome determinative in that a failure to comply with it can affect the outcome of the litigation. For this reason, this Court has never applied an outcome determination analysis in addressing a Rules Enabling Act challenge in a case arising pursuant to a federal substantive right. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 468-69 (1965). Rather, this Court has fashioned a two step test to determine a rule's validity under the Rules Enabling Act. First, the court must ask "whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive

law and for justly administering remedy and redress for disregard or infraction of them." *Hanna*, 380 U.S. at 464; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). A rule regarding pleading requirements obviously meets this criteria, so the rule in question passes the first test. The second prong of the analysis is that if the rule is one that regulates procedure, then the fact that it only incidentally affects substantive rights does not render it invalid. *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 111 S. Ct. 922, 934 (1991); *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5 (1987); *Hanna*, 380 U.S. at 465. Any effect on Petitioners' substantive rights was wholly incidental, and so does not violate the Rules Enabling Act.

**7. Any result other than dismissal would itself violate the Rules Enabling Act.**

Not only does the dismissal in this case not violate the Rules Enabling Act; in fact, any other result would itself violate the Rules Enabling Act because Lake Worth's substantive legal right to sovereign immunity would be destroyed. As previously discussed, the absolute immunity afforded Lake Worth is a substantive legal right that includes not only immunity from liability, but also immunity from suit, which right can only be overcome if an unconstitutional municipal policy is involved. To force Lake Worth to litigate a claim without the existence of any municipal policy being shown by Petitioners thus abridges Lake Worth's substantive legal rights, specifically, immunity from suit. *See, e.g., Elliott*, 751 F.2d at 1479; *Morrison v. City of Baton Rouge*, 761 F.2d 242, 243-44 (5th Cir. 1985).

Nor can the effect of refusing to dismiss the case be termed an "incidental" effect on Lake Worth's substantive legal right to immunity from suit. The substantive right at issue is the right to be free from procedural burdens inherent in litigation. To subject Lake Worth to these procedural burdens, including discovery and motion practice, rips a gaping hole in the very fabric of the immunity shield, based not upon a court ruling, nor even upon factual allegations raising the issue of the existence of a municipal policy, but upon the vague, conclusory statement by a plaintiff tracking the "magic words," unsupported by any factual allegations whatsoever showing the existence of the required policy.

The provisions of Rule 8 are not inconsistent with this requirement. If the Rules of Civil Procedure can be construed using their plain meaning to avoid a conflict with substantive law, so as to avoid invalidity under the Rules Enabling Act, they should be so construed. *Hanna*, 380 U.S. at 465; *Sibbach*, 312 U.S. at 11, 14. The broad language of Rule 8 can be interpreted consistently with the Rules Enabling Act to require that in a case brought under § 1983, in which a plaintiff seeks to overcome the existence of sovereign immunity by showing the existence of a municipal policy sufficient to create liability, a plaintiff must plead sufficient facts to raise an issue as to the existence of such a policy.

**8. Even if the Fifth Circuit erred in dismissing the Complaint, summary judgment for all defendants was still warranted.**

Even assuming for purposes of argument that dismissal of the Complaint was inappropriate, the order of

the district court is equally sustainable based upon the alternative relief granted by summary judgment. Petitioners offered no evidence in response to the motion for summary judgment that the actions complained of were taken pursuant to any governmental policy or custom. Petitioners had ample time to discover and come forward with such evidence, as determined by the district court. Hence, the Complaint was properly dismissed in any event, and further review of the grounds for dismissal is not warranted.

---

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of Petitioners' First Amended Complaint as to Respondent Lake Worth should be affirmed.

Respectfully submitted,

/s/ Wayne K. Olson  
TIM G. SRALLA  
WAYNE K. OLSON\*

Members of the Firm of:  
FIELDING, BARRETT & TAYLOR  
8851 Highway 80 West,  
Suite 300  
Fort Worth, Texas 76116-6041  
Telephone: (817) 560-0303  
Facsimile: (817) 560-3953

*Attorneys for Respondent  
City of Lake Worth, Texas*

\*Attorney of Record



**BEST AVAILABLE COPY**

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
INDEX OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	6
INTRODUCTION .....	7
THE GRAVAMEN OF A 42 U.S.C. §1983 MUNICIPAL LIABILITY ACTION .....	9
PLAINTIFFS' ALLEGATIONS LACK A STATED FACTUAL BASIS .....	11
FEDERAL COURTS ROUTINELY REQUIRE SPECIFICITY OF PLEADING IN SEVERAL CONTEXTS .....	19
SEVERAL CIRCUIT COURTS REQUIRE FACT PLEADING OF §1983 CLAIMANTS .....	21
VINDICATION OF THE TWO OFFICERS IN QUESTION RENDERS THE INADEQUATE TRAINING ALLEGATION MOOT .....	27
CONCLUSION .....	31

## INDEX OF AUTHORITIES

Cases	Page
<i>Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck</i> , 463 F.2d 620 (2nd Cir. 1972), <i>cert. denied</i> , 410 U.S. 944 (1973) ....	20
<i>Arnold v. Board of Education</i> , 880 F.2d 305 (11th Cir. 1989) .....	22,23
<i>Associated General Contractors, Inc. v. California State Counsel of Carpenters</i> , 459 U.S. 519 (1983) .....	21
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723, 740-741 (1975) .....	20
<i>Burnett v. Short</i> , 441 F.2d 405, 406 (5th Cir. 1971) ...	19,20
<i>Butz v. Economou</i> , 438 U.S. 478, 507 (1978) .....	20
<i>California Dump Truck Owners Assoc., Inc. v. Associated Gen. Contractors</i> , 562 F.2d 607, 615 (9th Cir. 1977) ...	19
<i>Canton v. Harris</i> , 489 U.S. 378 (1989) .....	6,10,11
<i>Correa-Martinez v. Arrillaga-Belendez</i> , 903 F.2d 49 (1st Cir. 1990) .....	19
<i>District Counsel 47, American Federation v. Bradley</i> , 795 F.2d 310 (3rd Cir. 1986) .....	21
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) ...	7,12-14,16
<i>Elliott v. Thomas</i> , 937 F.2d 338 (7th Cir. 1991), <i>cert. denied sub nom. Propst v. Weir</i> , 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) .....	17
<i>Estate of Himelstein v. Fort Wayne</i> , 898 F.2d 573 (7th Cir. 1990) .....	18
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976) .....	28
<i>Fullman v. Graddick</i> , 739 F.2d 553, 557 (11th Cir. 1984) .....	19
<i>Grandstaff v. Borger</i> , 767 F.2d 161 (5th Cir. 1985), <i>cert. denied</i> , 480 U.S. 916 (1987) .....	12
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	18
<i>Heart Disease Research Foundation v. General Motors Corp.</i> , 463 F.2d 98 (2nd Cir. 1972) .....	19

Cases	Page
<i>Johnson v. Wells</i> , 566 F.2d 1016 (5th Cir. 1978) .....	23
<i>Kauffman v. Moss</i> , 420 F.2d 1270 (3rd Cir. 1970), <i>cert. denied</i> , 400 U.S. 846 (1970) .....	21
<i>Languirand v. Hayden</i> , 717 F.2d 220 (5th Cir. 1983), <i>cert. denied</i> , 467 U.S. 1215 (1984) ..	6,11
<i>Los Angeles v. Heller</i> , 475 U.S. 796 (1986) .....	28
<i>Lynch v. Cannatella</i> , 810 F.2d 1363 (5th Cir. 1987) .....	15
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	15
<i>Monell v. Department of Social Services</i> , 436 U.S. 658, (1978) .....	8,9
<i>Morrison v. Baton Rouge</i> , 761 F.2d 242 (5th Cir. 1985) .....	12,15
<i>Nieto v. San Perlita Independent School District</i> , 894 F.2d 174 (5th Cir. 1990) .....	15
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985) .....	7,9,11
<i>Palmer v. San Antonio</i> , 810 F.2d 514 (5th Cir. 1987) ...	12,14
<i>Pembaur v. Cincinnati</i> , 475 U.S. 469 (1986) .....	9,10
<i>Powell v. Workmen's Compensation Bd.</i> , 327 F.2d 131, 137 (2nd Cir. 1964) .....	20
<i>Propst v. Weir</i> , 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) .....	17
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330, 345 (1979) .....	20
<i>Rodriguez v. Avita</i> , 871 F.2d 552 (5th Cir. 1989), <i>cert. denied</i> , 493 U.S. 854 (1989) .....	6,12,14,15
<i>Ross v. A. H. Robins Co.</i> , 607 F.2d 545, 558 (2nd Cir. 1979), <i>cert. denied</i> , 446 U.S. 946 (1980) ....	19
<i>Rotolo v. Charleroi</i> , 532 F.2d 920 (3rd Circuit 1976) .....	21
<i>Siegart v. Gilley</i> , 111 S.Ct. 1789 (1991) .....	16-18
<i>Slotnick v. Staviskey</i> , 560 F.2d 31 (1st Cir. 1977), <i>cert. denied</i> , 434 U.S. 1077 (1978) .....	20
<i>Stokes v. Bullins</i> , 844 F.2d 269 (5th Cir. 1988) .....	12
<i>Streetman v. Jordan</i> , 918 F.2d 555 (5th Cir. 1990) .....	13
<i>Tomera v. Galt</i> , 511 F.2d 504, 508 (7th Cir. 1975) .....	19



<b>Cases</b>	<u>Page</u>
<i>United States v. City of Philadelphia</i> , 644 F.2d 187 (3rd Cir. 1980) .....	24
<i>United States Parole Commission v. Geraghty</i> , 445 U.S. 394 (1980) .....	28
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975) .....	21
<b>Statutes</b>	
Federal Rule of Civil Procedure 12(b)(6) .....	7,19
42 U.S.C. § 1983 .....	8
<b>Other</b>	
Marcus, <i>The Revival of Fact Pleading under</i> <i>Federal Rules of Civil Procedure</i> , 86 Colum.L.Rev. 433, 449 (1986) .....	21

---

 No. 91-1657
 

---

IN THE  
**Supreme Court of The United States**

OCTOBER TERM, 1992

---

CHARLENE LEATHERMAN, et al,

*Petitioners*

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
 AND COORDINATION UNIT, et al,

*Respondents*

---

*On Writ of Certiorari*  
*To the United States Court of Appeals*  
*For the Fifth Circuit*

---

**RESPONDENT**  
**CITY OF GRAPEVINE, TEXAS' BRIEF**

---

**STATEMENT OF THE CASE**

Respondent provides the following information omitted from Petitioners' Statement of the Case because it is relevant to the questions presented for review.

This civil rights claim was originally filed on November 22, 1989, by Charlene and Kenneth Leatherman, individually and in their capacities as next friends of their minor son Travis Leatherman (hereinafter referred to as "the Leatherman Plaintiffs"), against Defendants Tarrant County Narcotics Intelligence and Coordination Unit (hereinafter referred to as "TCNICU"), and Tarrant County, Texas. The Leatherman Plaintiffs claimed that the Defendants were liable to them, under 42 U.S.C. § 1983 and state law, for damages arising out of the alleged illegal entry and search of their residence. The Leatherman Plaintiffs filed this

suit in the 96th Judicial District Court of Tarrant County, Texas. The City of Grapevine, Texas is not a party Defendant to the Leatherman allegations.

On December 12, 1989, Defendants TCNICU and Tarrant county petitioned the United States District Court for the Northern District of Texas, Fort Worth Division, for removal of the Leatherman Plaintiffs' claims to federal court under 28 U.S.C. § 1331. (R. 1) On December 20, 1989, the Defendants filed their Answer (R. 13), and simultaneously filed a Motion to Dismiss or for Summary Judgment. (R. 18) On February 1, 1990, Judge David O. Belew, Jr. entered an order to dismiss the Leatherman Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) because their complaint failed to state a claim upon which relief could be granted; specifically, Plaintiffs' complaint failed to allege any custom, practice or usage from which a policy may be inferred, which would violate any constitutional rights of the Plaintiffs in this cause. (R. 70).

On February 8, 1990, the Leatherman Plaintiffs filed a Motion to Vacate Dismissal of Plaintiffs' Complaints. (R. 71) On March 8, 1990, the district court granted Plaintiffs' motion to vacate dismissal and granted the Plaintiffs leave to amend their complaint with the expectation that they would conform their pleadings to specifically state facts to support a "failure to train" based § 1983 claim.

On March 23, 1990, the Leatherman Plaintiffs filed their First Amended Complaint. In this complaint the Leatherman Plaintiffs added the City of Lake Worth, Texas as an additional Defendant. The amended complaint also included as additional Plaintiffs Gerald Andert, Donald Andert, Lucy Andert, Pat Lealos, and Kevin and Jerri Lealos, individually and in their capacities as next friends of their minor children, Shane and Trevor Lealos (hereinafter referred to as "the Lealos/Andert Plaintiffs"). The Lealos/Andert Plaintiffs asserted a separate cause of action and added the City of Grapevine, Texas as an additional Defendant.

(Tr. 92) The amended complaint did not specifically allege facts to support a failure to train based civil rights action.

On April 16 and April 17, 1990, both the City of Lake Worth (R. 125), and the City of Grapevine (R. 137), filed Original Answers. Concurrent with this activity the original Defendants, TCNICU and Tarrant County, filed their second Motion to Dismiss or for Summary Judgment. (R. 141) On June 7, 1990, these same two Defendants filed a Motion for Protective Order. (R. 249) However, before these motions were decided by the court, a special order dated August 9, 1990, transferred the case from Judge Belew's court to Judge John H. McBride's court. (R. 429)

On December 31, 1990, Judge McBride granted TCNICU and Tarrant County's protective order (R. 455), and on January 22, 1991, dismissed the Plaintiffs' complaint for a second time as to these two Defendants. In addition, the court dismissed the Plaintiffs' complaint against both Lake Worth and Grapevine. (R. 457)

The following is a brief description of the events which gave rise to the Lealos/Andert Plaintiffs' allegations against the City of Grapevine, Texas, which allegations are the basis of this appeal. A similar description of the Leatherman Plaintiffs' allegations against the other Defendants is not provided here because the Leatherman Plaintiffs have made no claim against the City of Grapevine, Texas.

#### *The Lealos/Andert Claims*

On January 30, 1989, Sergeant R.W. Hart and Officer Tim Stewart of the Southlake Police Department answered an audible alarm call in the 2500 block of North Kimball in Southlake, Texas. Upon exiting his vehicle, Sgt. Hart smelled a very strong odor of phenacetic acid and ether. As a trained narcotics investigator, Sgt. Hart recognized these odors to be associated with the

"cooking" of amphetamines. Officer Stewart also smelled the suspicious odor. (R. 179)

After contacting another officer from the Southlake Police Department and conducting a preliminary investigation, the officers contacted Sergeant Larry Traweck of the Tarrant County Narcotic Task Force to request assistance. Upon arrival, the Task Force members determined that there was an amphetamine lab in the immediate area. (R. 179) While searching for the source of the smell, the Task Force members pinpointed their investigation on a residence located at 2058 N. Kimball, belonging to Kevin and Jerry Lealos. Due to the fact that the wind was blowing from the South Southwest, the odor was very strong at the Northeast corner of the property, and could not be smelled on the south side of the property. (R. 183) However, Task Force members were unable to check the residence more closely because of several male subjects and a large dog in the yard. (R. 179)

Subsequently, Sgt. Traweck advised the Southlake Police Department that there was probable cause to begin gathering information in order to procure a search warrant. Besides the odor, the officers discovered several other reasons that made the issuance of the search warrant appropriate. A check of Water Department records indicated that water consumption at 2058 N. Kimball had risen from 13,000 gallons in December, 1988 to 17,000 gallons in January, 1989. Also, after acquiring the names of persons receiving mail at the residence from the post office, criminal history checks were run. The checks revealed that one of the subjects, Kevin Lealos, had an extensive criminal record. (R. 180)

When informed that the search warrant was written and signed Sgt. Hart went to the city manager and got permission to use the Grapevine Police Department Tactical Team for entry into the residence. In addition, Sgt. Hart told the city manager that he wanted to have an ambulance and fire engine standing by. (R. 180)

The Grapevine Police Department Tactical Team, wearing black coveralls with the words "Grapevine Police" written in red on their front pockets, entered the residence at approximately 8:00 p.m. As the Tactical Team entered the residence, they shouted "Police, get down!" numerous times. (R. 199) In fact, these shouts were heard by at least three officers who did not participate in the initial entry and were one block away from the residence at the time. (R. 181)

Once inside the residence, the Tactical Team members told the occupants to get down on the floor. One occupant of the residence, an older white male later identified as Gerald Andert, refused to get down on the floor and instead approached a member of the Tactical Team and became verbally abusive. Immediately thereafter, Gerald Andert lunged toward Police Officer Bewley and took hold of the barrel of his service revolver. (R. 197) Fearing that he was about to be disarmed, Officer Bewley struck Gerald Andert in the forehead with his flashlight. (R. 198) The Grapevine Tactical Team finished securing the house, requested medical assistance for Gerald Andert, and left when Southlake and Tarrant County Narcotic Task Force officers took charge of the scene. (R. 198)

Once inside the residence a search by Task Force officers revealed that there was not a drug lab on the premises at that time. (R. 185) At this point, the Southlake officers informed the occupants of the residence why they had executed a search of the home. Kevin Lealos, an occupant of the residence at the time of the search stated to officers that he thought the search was because of a van that was located on the premises. He stated that he had "loaned his van to someone and they had used it to boil some stuff in Euless." (R. 202) When officer Larry Traweck asked what was boiled in the van, Lealos refused to say anything more. (R. 202)

When brought to the ambulance by paramedics, Gerald Andert refused treatment for what the paramedics listed in their report as



a "small contusion" on his forehead. (R. 200) The entire time that Gerald Andert was in police custody he was verbally abusive to both the officers and the paramedics saying things such as, "Are one of you the assholes that hit me? You get that little punk back here with the blood on his stick that hit me and I'll kill him myself." (R. 202)

The search ended and the officers left the premises at approximately 9:15 p.m. All inclusive, the entire process took less than one and one-half hours. (R. 186)

### SUMMARY OF ARGUMENT

The Fifth Circuit correctly affirmed the district court's finding that the Lealos/Andert Plaintiffs' conclusory allegations of municipal liability for failure to train under 42 U.S.C. § 1983 failed to state a claim on which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To properly allege a § 1983 action it was necessary for the Plaintiffs to set forth a pleading containing facts to support their claim. *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir. 1989). Plaintiffs did not do this and merely set forth boilerplate claims citing only one example of an alleged *failure to train*. Under both the Supreme Court decision of *Canton v. Harris*, 489 U.S. 378 (1989), and the Fifth Circuit opinion of *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), the one example made the basis of the present case is not enough to impose liability for failure to train, since the cited behavior must "constitute gross negligence amounting to conscious indifference."

Once the district court concluded that the Leatherman Plaintiffs failed to state a cause of action, the court correctly dismissed the Lealos/Andert Plaintiffs' claims sua sponte. It is widely acknowledged that it is within the discretion of the trial court to dismiss a complaint for failure to state a claim. The Leatherman Plaintiffs' conclusory boilerplate allegations had previously been dismissed for failure to state a claim and subsequently reinstated.

In cases alleging securities fraud, civil rights and conspiracy many federal courts have required a more particularized allegation of fact. This heightened pleading requirement when applied to civil rights complaints preserves important functions and protections of official immunity while avoiding waste of taxpayer monies and judicial resources. *Elliott v. Perez*, 751 F.2d 1472, 1477 (5th Cir. 1985). The United States Supreme Court has held that to establish a case of inadequate training the claimant must plead and prove facts "that the policy makers deliberately chose a training program which would prove inadequate". *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Additionally, in a separate action, the police officers who allegedly committed the civil rights violation; Greg Bewley and Larry Traweck, were recently granted take nothing judgments against the Andert/Lealos Plaintiffs with respect to the same facts made the basis of this suit. (See Appendix) Consequently, vindication of the individual officers' conduct renders moot the allegations of municipal liability for failing to adequately train the officers.

### INTRODUCTION

The Fifth Circuit correctly affirmed the district court's dismissal of the Andert/Lealos Plaintiffs' 42 U.S.C. § 1983 claims against Defendant City of Grapevine because the Plaintiffs failed to state a cause of action upon which relief could be granted. In an order dated January 22, 1990, the district court dismissed all of the Plaintiffs' claims against all of the Defendants. (R. 475) This order included dismissal of the claims against both Defendant Cities of Grapevine and Lake Worth even though no Motion for Dismissal or Summary Judgment was filed by these Defendants. The district court entered this sua sponte dismissal under Federal Rule of Civil Procedure 12(b)(6), because The Lealos/Andert Plaintiffs' pleadings failed to state a claim on which relief could be granted. The Lealos/Andert Plaintiffs do not challenge the sua

sponte nature of the district court's action on Petition for Writ of Certiorari.

In their First Amended Complaint, the Lealos/Andert Plaintiffs brought their claims against the City of Grapevine pursuant to 42 U.S.C. § 1983. (R. 92) 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, a citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Specifically, the Lealos/Andert Plaintiffs have alleged that:

. . . Defendant City of Grapevine failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Grapevine, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train . . .

Plaintiffs' First Amended Complaint (R. 104-105, 107) In order to understand why the district court dismissed these claims, it is helpful to review what is required to adequately allege a § 1983 complaint against a municipality.

## THE GRAVAMEN OF A 42 U.S.C. § 1983 MUNICIPAL LIABILITY ACTION

The landmark case in municipal liability under § 1983 is *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In *Monell* the Plaintiffs challenged the Defendant's policy of requiring pregnant employees to take unpaid sick leave before it was medically necessary. The *Monell* holding establishes that § 1983 liability only applies to a municipality when the injury is visited pursuant to municipal "policy" or "custom." Since official policy is required, a municipality cannot be sued under § 1983 for injury inflicted solely by its employee or agent. In other words, the theory of respondeat superior is not enough to impose municipal liability. *Monell*, 436 U.S. at 677.

In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme Court further defined what is necessary in order to impose municipal liability. In *Tuttle*, Oklahoma city was sued under § 1983 because a police officer allegedly violated Tuttle's rights by using "excessive force in his apprehension." The Plaintiff charged that a municipal "custom or policy" had led to the Constitutional violations. *Tuttle*, 471 U.S. at 811. In reversing the decision by the lower courts, the Supreme Court stated that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824.

Less than one year after *Tuttle*, the Supreme court decided *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur*, the court readdressed the question of whether, and under what circumstances, a decision by municipal policymakers on a single occasion may satisfy the requirement under *Monell* and § 1983 that the action be taken pursuant to official municipal policy. The court held that, subject to restrictions, a municipality could be held liable for a single incident of unconstitutional behavior.

Justice Brennan, writing for a plurality states, "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur*, 475 U.S. at 481.

However, after making this broad statement, the Court immediately limited it by emphasizing that § 1983 liability only attaches when the decision was made by someone who possesses final authority to establish municipal policy. *Id.* In addition, the Court limited municipal liability by holding that, "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483.

Finally, in *Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that failure to train municipal employees may serve as a basis for § 1983 liability only where it amounts to deliberate indifference to the rights of persons with whom the police come into contact. Furthermore, the deficiency in the city's training program must be closely related to the ultimate injury. The Supreme Court reasoned that the adoption of a lesser standard of fault would open municipalities up to enormous liability under § 1983 and would result in de facto respondeat superior. *Canton*, 489 U.S. at 387.

It is clear from applying the preceding Supreme Court cases to the facts of this case that the Lealos/Andert Plaintiffs did not plead a claim upon which relief could be granted. The Lealos/Andert Plaintiffs urge that municipal liability for failure to train should be found for one incident of supposed failure to train. This is clearly not appropriate under the standards set by the Supreme Court for municipal liability under § 1983. A discussion of the profound failure of the Plaintiffs' complaint to set forth a § 1983 claim follows.

## PLAINTIFFS' ALLEGATIONS LACK A STATED FACTUAL BASIS

Even if all of the Lealos/Andert Plaintiffs' allegations are taken as true, they still fail to state a cause of action of municipal liability for failure to train its police officers. In their complaint, the Plaintiffs use mere "boilerplate" language (which tracks the exact language used in *Canton*), without any factual statements to back it up. First, the Andert/Lealos search was a completely legal search. The fact that the search did not uncover the suspected drug lab does not make the basis for the search faulty from the outset, as the Lealos/Andert Plaintiffs would have this Court believe. Thus, the unsuccessful raid was unrelated to any training in executing search warrants that the municipality might have adopted. The police were legally in the Lealos home at the time the incident occurred.

In addition, the claim that Gerald Andert was struck without provocation cannot be determined to have been caused by the City of Grapevine's policy of alleged "inadequate training." As the Supreme Court stated in *Tuttle*, "... it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from a conscious choice — that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 471 U.S. at 823. Furthermore, the Lealos/Andert Plaintiffs received a take nothing judgment in their trial against the individual officers accused of the wrongdoing in executing the warrant in question. (See Appendix — Final Judgement)

In addition to the Supreme Court cases, the Fifth Circuit has a long standing tradition of being guarded concerning § 1983 claims for municipal liability. Dealing with the issue of failure to train, the Fifth Circuit held in *Languirand* 717 F.2d at 227 that, "[I]f there is a cause of action under § 1983 for failure to properly train a police officer whose negligent or grossly negligent performance



of duty has injured a citizen, such failure to train must constitute gross negligence amounting to conscious indifference. . . ." See e.g., *Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988); *Grandstaff v. Borger*, 767 F.2d 161 (5th Cir. 1985).

It is apparent from the pleadings in this case that, even if the Lealos/Andert Plaintiffs' pleadings are taken as true, no action taken by any police officer involved in the incident could constitute "gross negligence amounting to conscious indifference" on the part of the City of Grapevine. Therefore, under all of the standards illustrated above, Plaintiffs' claims must fail.

Even if Plaintiffs had stated a substantive claim under § 1983, the form of their complaint still fails to meet the pleading requirements that the Fifth Circuit and other circuits have adopted in these cases. The Fifth Circuit has repeatedly held that the Plaintiff in such an action must set forth a highly particularized pleading because of the unique characteristics of a § 1983 action. See, *Rodriguez v. Avita*, 871 F.2d 514 (5th Cir. 1989); *Palmer v. San Antonio*, 810 F.2d 514 (5th Cir. 1987); *Morrison v. Baton Rouge*, 761 F.2d 242 (5th Cir. 1985) and; *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

In *Elliott*, the court explained that the lack of pleading with particularity "eviscerates important functions and protections of official immunity." *Elliot*, 751 F.2d at 1476. The *Elliott* case has a very generous discussion of this entire field of law and provides a listing of other circuits' decisions requiring at least a minimum of specificity in the pleading of civil rights complaints. *Id.* at 1479.

In *Elliott*, Judge Higginbotham wrote a brief but noteworthy concurring opinion. While Judge Higginbotham agreed with the majority opinion, he pointed out that he would have reached this destination by following a different path. Instead of mandating a "heightened pleading" requirement in cases involving a potential immunity defense, Judge Higginbotham would merely rule that a petition fails to state a cause of action against governmental officials unless it includes a statement of sufficient facts that, if

true, would demonstrate the absence of immunity. *Id.* at 1482. Judge Higginbotham added that it does no violence to the concept of notice pleading to suggest that the adequacy of a pleading is case specific. In other words, Judge Higginbotham would require that to state an action where immunity is potentially involved, the case must be stated with specificity.

In this concurring opinion Judge Higginbotham also explained that

Of course, some plaintiffs will be unable to state a claim without the benefit of discovery, even though discovery might have surfaced sufficient facts, but denial of some meritorious claims is the direct product of the immunity doctrine which weighed these losses when it struck the policy balance. This, at least for me, only makes the plainer that I am sure that I am on sure ground in concluding that the accommodation of notice pleading and immunity presents a question of claim definition, peculiarly within the authority granted to us by Art. III.

*Id.* at 1483.

Moreover, Judge Higginbotham would hold that the courts have the judicial authority to decide when a petition or complaint has been pleaded adequately to state a valid cause of action.

Petitioners cite *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990) on page 18 of their Petition for the proposition that the Fifth Circuit itself has acknowledged that application of the "heightened pleading" requirement may result in the dismissal of certain meritorious claims.

The language that Petitioners point to is located in footnote 2 on page 557 of the *Streetman* decision. Petitioners have taken the quote out of context for their own purposes. The entire footnote is as follows:

This court is not unsympathetic to the dilemma the contours of this doctrine create for some § 1983 plaintiffs. Because the doctrine prevents them from seeking discovery, they frequently cannot collect sufficient facts to defeat the defense at the pleading stage. In a persuasive concurring opinion to *Elliott*, discussed previously, Judge Higginbotham recognized these conflicting interests, and reluctantly concluded that 'denial of some meritorious claims is the product of the immunity doctrine which weighed these losses when it struck the policy balance.' *Elliott*, 751 F.2d at 1483 (Higginbotham concurring).

Basically, what Judge Higginbotham was saying is that while some meritorious claims may be denied by the "heightened pleading" requirement this fact was known when the immunity doctrine was being developed and this is a necessary cost, worth paying, for the doctrine as a whole.

While *Elliott* dealt with immunity of public officials, the same rationale behind the decision applies equally to municipal liability in § 1983 cases. In *Palmer*, the first Fifth Circuit case to deal with a § 1983 action against a municipality, the court used the same reasoning that was used in *Elliott* in requiring § 1983 Plaintiffs to state specific facts and not merely conclusory allegations against a municipality.

In addition, the policy reasons behind this pleading standard are the same for cases involving public officials and municipalities. Without a higher pleading standard in municipal liability cases, municipalities would be haled into court in many instances when, under the substantive law of § 1983, these cases would eventually be thrown out because the Plaintiffs could not meet their burden of proof. This situation wastes both the taxpayer's money and scarce judicial resources. By adopting a heightened pleading standard at the outset, the Fifth Circuit is ensuring that only truly meritorious § 1983 claims go forward, and that these meritorious claims are given the attention they rightfully deserve.

As the district court opinion correctly pointed out (R. 464), under the recent *Rodriguez* holding, boilerplate, conclusory allegations combined in a description of a single incident will not satisfy the pleading requirements for a § 1983 case. When dealing with a pleading no more generally worded than the one at hand, the Fifth Circuit in *Rodriguez* stated, "Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer — a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else." *Rodriguez*, 871 F.2d at 255.

In *Nieto v. San Perlita Independent School District*, 894 F.2d 174 (5th Cir. 1990), the Fifth Circuit addressed the rationale behind the doctrine of governmental immunity and the limitations of allowing offensive discovery by a claimant. The court stated that the "heightened pleading" obligation requires the plaintiff's complaint to state specific facts sufficient to overcome a qualified immunity defense. This requirement alleviates the defendants who may be entitled to official immunity from the burdens of traditional pretrial depositions, interrogatories and request for admissions. *Id.* at 178. Consequently, the court concluded, the plaintiff in a § 1983 suit must shoulder the burden of pleading a prima facie case, including the obligation of alleging detailed facts supporting the contention that a plea of immunity cannot be sustained. *Lynch v. Cannatella*, 810 F.2d 1363, 1376 (5th Cir. 1987), quoting *Morrison v. City of Baton Rouge*, 761 F.2d 242, 245 (5th Cir. 1985). *Nieto*, 894 F.2d at 178.

The *Nieto* court relied on United States Supreme Court authority to support the "heightened pleading" requirement by citing the case of *Mitchell v. Forsyth*, 472 U.S. 511 (1985) wherein the United States Supreme Court stated that "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 526.

Furthermore, the Fifth Circuit held that once a complaint against an official adequately raises the likely issue of immunity, the district court should on its own authority require a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that a plea of immunity cannot be sustained. *Id.* at 178, citing *Elliott*, 751 F.2d at 1482.

In page 8 of the Petition for Writ of Certiorari, Petitioners state that it appeared that the Supreme Court would determine the validity of the "heightened pleading" requirement when it granted certiorari in *Siegart*, but eventually the United States Supreme Court affirmed the lower court's decision on other grounds. *Siegart v. Gilley*, — U.S. —, 111 S.Ct. 1789, 115 L.Ed.2d 1084 (1991). The *Siegart* court affirmed the lower court's decision by saying, "the court of appeals majority concluded that the District Court should have dismissed petitioner's suit because he had not overcome the defense of qualified immunity asserted by respondent. By a different line of reasoning, we reach the same conclusion, and the judgment of the Court of Appeals is therefore affirmed. *Id.* at 1794.

In *Siegart*, Justice Kennedy wrote a concurring opinion in favor of retaining the "heightened pleading" standard. Justice Kennedy's opinion stated in part:

I would affirm for the reasons given by the court of appeals. Here malice is a requisite showing to avoid the bar of qualified immunity. The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter. See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most worka-

ble means to resolve it. The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 & 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Upon the assertion of a qualified immunity defense, the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.

*Siegart*, 111 S.Ct. at 1295.

*Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied sub nom. Propst v. Weir*, 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) is cited by Petitioners on page 13 of the Petition for Writ of Certiorari for the proposition that the 5th Circuit's "heightened pleading" requirement has been rejected by the 7th Circuit Court of Appeals.

The Petitioners here are attempting to use this case on their behalf by stating that the 7th Circuit had "deprecated the heightened pleading requirement." In fact, the *Thomas* court does wrestle with the whole field of immunity and how it is best handled by the courts, but this same court does not openly reject the "heightened pleading" requirement. In fact, the court stated the following:

Like Justice Kennedy, See *Siegart*, 111 S.Ct. at 1795 (concurring opinion), we think that the best solution to the conundrum is to require the plaintiff to produce "specific, nonconclusory, factual allegations which establish [the necessary mental state], or face dismissal." Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.



*Thomas*, 937 F.2d at 344-345. The court goes on to list a long series of cases that have adopted and elaborated on this approach.

Thereafter, the court added that they "deprecate" the expression "heightened pleading requirement" and would rather speak of the minimum quantum of proof required to defeat the initial motion for summary judgment. It appears that the Seventh Circuit is not comfortable with the phrase "heightened pleading requirement" although this court does appreciate the need to conform with the ruling of the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Harlow* amplifies the need to protect the rights of entities and persons who may enjoy immunity. A higher level of pleading than is ordinarily required by the Rules may be called for in immunity cases. This is evident by their agreement with Judge Kennedy in *Siegart* that the plaintiff is required to present specific and nonconclusory factual allegations.

Another Seventh Circuit decision, *Estate of Himelstein V. Fort Wayne*, 898 F.2d 573 (7th Cir. 1990), required pleading of specific facts by a § 1983 claimant. When speaking of the pleading requirements for a civil rights claim the court held that:

A § 1983 claim does, indeed, require an allegation that some state actor deprived the plaintiff of a federal right. But, in order to state such a claim sufficiently, a plaintiff must allege facts that, if believed, would show that a federal right was actually violated. 42 U.S.C. § 1983 confers no substantive federal rights; rather, it is a remedial provision designed to afford redress for state deprivation of federal rights. Hence, no § 1983 action can be maintained until a federal right has actually been violated.

*Id.* at 575.

The Seventh Circuit upheld the dismissal of the lower court finding that the petitioners had failed to allege any facts in support of their claim that some federally guaranteed constitutional right had been violated.

## FEDERAL COURTS ROUTINELY REQUIRE SPECIFICITY OF PLEADING IN SEVERAL CONTEXTS

Securities fraud cases, like civil rights claims and conspiracy allegations have proliferated in recent times. Many federal courts have responded by requiring securities fraud plaintiffs to plead detailed facts. To some extent this approach can be explained by the special pleading requirements of Rule 9(b) Fed. R. Civ. P. which requires that in fraud cases "the circumstances constituting fraud . . . shall be stated with particularity." While some courts find that Rule 9(b) is designed to provide only "slightly more" detail than Rule 8(a)(2) other courts have insisted that the plaintiff provide specific details that support its factual conclusions. Compare *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975) with *Ross v. A. H. Robins Co.*, 607 F.2d 545, 558 (2nd Cir. 1979), cert. denied, 446 U.S. 946 (1980).

Similarly, many federal claimants include conspiracy allegations in their complaints. Federal courts have responded by requiring the conspiracy allegation to be plead with factual specificity. For example, in *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98 (2nd Cir. 1972) the trial court's dismissal for failure to state a claim was affirmed because it was well within the district court's discretion to dismiss the claim since no facts were alleged supporting an anti-trust conspiracy. The Second Circuit explained that although federal rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the anti-trust laws without any supporting facts permits dismissal. 463 F.2d at 100. At a minimum plaintiffs alleging conspiracy are required to enumerate the overt acts alleged to show that the conspiracy existed and that broad, vague charges of conspiracy do not suffice. See e.g., *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984); *California Dump Truck Owners Assoc., Inc. v. Associated Gen. Contractors*, 562 F.2d 607, 615 (9th Cir. 1977); *Burnett v. Short*,

441 F.2d 405, 406 (5th Cir. 1971); and *Powell v. Workmen's Compensation Bd.*, 327 F.2d 131, 137 (2nd Cir. 1964), and cases cited therein.

The situations in which specific fact pleading has been required by federal courts possess significant common characteristics. On the one hand the securities fraud, civil rights and conspiracy claims represent important segments of activity in the burgeoning federal dockets, each type of claim having experienced enormous growth since the federal rules were adopted. More significantly, however, these situations present particularly difficult problems involving the potential abuse of litigation because they often involve admitted behavior that can, depending on the defendant's state of mind, result in very substantial liability. In light of the scope of potential discovery on issues involving the defendant's intention and knowledge and the attendant vexation and expense, it is understandable that many federal courts have attempted to identify and weed out groundless cases at an early stage.

In contrast, the Supreme Court has observed that plaintiffs with weak claims have good reason to want to stave off dismissal because "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-741 (1975). See also, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). On the other hand, it may be that defendants resist more vigorously when plaintiff's allegations are vague and notice pleadings make early settlement difficult because the true center of the dispute cannot be identified.

Additionally, the Supreme Court has also provided support for specificity in pleading in certain circumstances. In *Butz v. Economou*, 438 U.S. 478, 507 (1978) (dictum) the Supreme Court suggested that "insubstantial" cases can be dismissed despite

"artful pleading" and appeared receptive to using pleading motions to weed out meritless cases. Likewise, in a 1983 decision reversing the dismissal of an anti-trust case, the Supreme Court instructed the district court to require plaintiff to plead with particularity, concluding that "in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (dictum). Furthermore, the Supreme Court has increasingly relied on fact pleading to resolve standing issues having rejected plaintiffs' standing allegations as insufficient because they were not supported by "particularized allegations of fact" and "specific, concrete facts" showing harm to plaintiffs. *Warth v. Seldin*, 422 U.S. 490, 501, 503, 508-09 (1975).

#### SEVERAL CIRCUIT COURTS REQUIRE FACT PLEADING OF § 1983 CLAIMANTS

Like securities fraud cases civil rights suits have since 1938 become a staple of the federal courts' civil docket. Most courts hold on public policy grounds that conclusory allegations are inadequate to state a civil rights claim and require specific delineation of the facts claimed to show a violation of Plaintiff's civil rights. Marcus, *The Revival of Fact Pleading under Federal Rules of Civil Procedure*, 86 Colum.L.Rev. 433, 449 (1986). In those civil rights cases, as in securities fraud cases, the courts focus on the Plaintiff's allegations about intent. *Id.* and cases cited therein.

In *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49 (1st Cir. 1990), the First Circuit Court of Appeals held that the plaintiff's pleadings did not state a cause of action under § 1983 and further stated that the district court did not abuse its discretion in failing to grant the plaintiff a request for leave to



amend his complaint. In reaching this decision, the First Circuit held that:

Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions or outright vituperation . . . moreover, the Rule does not entitle the plaintiff to rest on "subjective characterizations" or conclusory descriptions of "a general scenario which could be dominated by unpleaded facts" . . . We understand, that for pleading purposes, the dividing line between sufficient facts and insufficient conclusions is "often blurred" . . . but the line must be plotted: it is only when such conclusions are logically compelled, or at least supported by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that "conclusions" become "facts" for pleading purposes. . . . there is another principle at work as well. We have frequently recognized that, in cases where civil rights violations are alleged, particular care is required to balance the liberality of the civil rules with the need to prevent abusive and unfair vexation of defendants. . . . a civil rights complaint must "outline facts sufficient to convey specific instances of unlawful discrimination." . . . put another way, a plaintiff may not prevail simply by asserting an inequity and tacking on self-serving conclusions that the defendant was motivated by a discriminatory animus. The alleged facts must specifically identify the particular instances of discriminatory treatment and, as a logical exercise, adequately support the thesis that the discrimination was unlawful. . . . Discrimination based on unprotected characteristics or garden-variety unfairness will not serve.

*Id.* at 52-53.

It is clear from the *Correa-Martinez* decision that the 1st Circuit requires a fairly significant level of pleading before a plaintiff's

civil rights allegation will rise to the level of stating a valid cause of action.

Similarly, in *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977), (1978) the First Circuit upheld a district court's dismissal of a plaintiff's cause of action due to the fact that the plaintiff had pleaded with nonspecific and conclusory claims. On page 643 of this decision, the First Circuit held that conclusory allegations were inadequate to state a claim and that in an effort to control frivolous conspiracy suits under § 1983, federal courts have come to insist that the complaint state with specificity the facts that in the plaintiff's mind show the existence and scope of the alleged conspiracy. It has long been the law that in this and other circuits, that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claim with references to material fact.

In *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2nd Cir. 1972) the Second Circuit upheld the dismissal of the plaintiff's complaint for failure to raise a federal question in the body of the pleadings. This court held that mere conclusory allegations do not provide an adequate basis for the assertion of a claim for violations of § 1983 and § 1943. The court held that the allegations were conclusory in that they failed to supply adequate facts to bolster concluded allegations. The court reasoned that because the pleadings contained merely the end product of the allegation and not the component parts, that is, only the conclusions and not the facts that those conclusions were based on that there was not adequate notice to inform the defendants of the basis of the charges.

In *Rotolo v. Charleroi*, 532 F.2d 920 (3rd Circuit 1976) the plaintiff filed suit under § 1983. Thereafter, the district court dismissed the complaint and the petitioner appealed to the Third Circuit. The Third Circuit, after reviewing this decision, reversed and remanded to the lower court saying that the plaintiff should



be entitled to amend, but along the way did write the following regarding appropriate pleading levels.

In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in state courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims. *Rotolo*, 532 F.2d at 922. Citing *Kauffman v. Moss*, 420 F.2d 1270, 1275-76 (3rd Cir. 1970).

In *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980) the Department of Justice filed a complaint alleging in part that the Philadelphia Police Department systematically violated the civil rights of minority persons by abusing them physically. The complaint was signed by several government lawyers, including the Attorney General. 644 F.2d at 205. Citing, among other things, the fact that such a claim subjects public officials, policemen and citizens alike to considerable expense, vexation and perhaps unfounded notoriety, the trial court dismissed the complaint. *United States v. City of Philadelphia*, 482 F.Supp. 1274, 1278 (E.D.Pa. 1979), *aff'd*, 644 F.2d 187 (3rd Cir. 1980). The Third Circuit affirmed on the ground that the complaint did not satisfy the specificity requirement for civil rights cases. The Third Circuit explained that if the charges contained in the complaint are frivolous, they should be dismissed at the earliest possible stage. On the other hand, if there is genuine substance to the civil rights allegations the public interest requires an expeditious adjudication which goals are served by specificity of pleading. *Id.* at 1278.

In *District Counsel 47, American Federation v. Bradley*, 795 F.2d 310 (3rd Cir. 1986) several black probation officers filed employment discrimination claims alleging that they were the victims of discriminatory promotional examinations. The U.S. District Court for the Eastern District of Pennsylvania granted motions to dismiss these claims. The court of appeals vacated and remanded this decision holding that it was not necessary to the sufficiency of the complaint that plaintiffs identify each specific action taken by each individual plaintiff and secondly, that the district court should have at least granted plaintiffs leave to amend their complaint. The Third Circuit decision speaks to the pleading requirements of civil rights complaints:

Generally, we should construe pleadings liberally . . . however, it is undisputed that this court has established a higher threshold of factual specificity for civil rights complaints . . . a substantial number of these cases are frivolous or should be litigated in the state courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in this litigation, and still keep the doors of the federal courts open to legitimate claims . . . We have said that "a civil rights complaint that relies on vague and conclusory allegations does not provide "fair notice" and will not survive a motion to dismiss.

*Id.* at 313.

In *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989) parents of a minor brought a § 1983 action against school officials claiming that the officials pressured their teenage daughter into having an abortion. The United States District Court granted a defense motion to dismiss for failure to state grounds upon which relief could be granted. Plaintiffs thereafter appealed to the 11th Circuit. The Circuit Court affirmed in part, reversed

in part and remanded for further proceedings. Before reaching its decision, the court did provide some enlightening language regarding pleading § 1983 claims.

To state a claim for relief, Rule 8 of the Federal Rules of Civil Procedure merely requires "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). It is well established that a complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of the complaint's allegations. *Id.* at 45, 78 S.Ct. at 101. Generally, the Federal Rules of Civil Procedure do not require a claimant to set forth in detail the facts upon which he bases his claim. *Id.* at 47, 78 S.Ct. at 102. Rather, cases in which the facts do not establish a true controversy are more properly disposed of through summary judgment. However, in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases. *Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978). Typically, Rule 8 is applied more rigidly to allegations of conspiracy and absolute immunity, and to claims pled against a local government that the challenged conduct constitutes its official policy or custom.

*Arnold*, 880 F.2d at 310.

It is clear that while the Eleventh Circuit does not expressly adopt the phrase "heightened pleading" they, like several of the other circuits, require a higher than normal level of pleading to withstand a motion for dismissal in § 1983 cases.

## VINDICATION OF THE TWO OFFICERS IN QUESTION RENDERS THE INADEQUATE TRAINING ALLEGATION MOOT

In this action the City of Grapevine is defending itself against the allegations of the Andert/Lealos Plaintiffs. The City of Grapevine is not a Defendant with respect to the causes of action asserted by the Leatherman Plaintiffs. The Andert/Lealos Plaintiffs allege that the City of Grapevine is liable under 42 U.S.C. § 1983 because it had a municipal policy or custom of inadequately training its police officers concerning the execution of search warrants. (Tr. 92, 107) Further, Plaintiffs allege that "... in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of Defendant City of Grapevine, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train." (Tr. 107)

The two police officers who allegedly were inadequately trained and committed the civil rights violation against the Andert/Lealos Plaintiffs, Greg Bewley and Larry Traweck, have been granted take-nothing judgments against the Andert/Lealos Plaintiffs with respect to the same facts made the basis of this suit. The Memorandum Opinion and Order and Final Judgment in favor of Officers Greg Bewley and Larry Traweck in Cause No. 4-91-068 in the United States District Court for the Northern District of Texas, Fort Worth Division, are attached hereto as the Appendix. Consequently, vindication of the individual officers' conduct renders moot the allegations of municipal liability against the City of Grapevine for failing to adequately train its officers.

Generally, mootness is a concept of justiciability which is derived from the fundamental limitation in Article III of the United States Constitution which requires a case or controversy as a prerequisite to appellate review by the Supreme Court.

*Franks v. Bowman Transportation Co.*, 424 U.S. 747, 754 (1976). A federal court's jurisdiction can be invoked only when the Plaintiff has suffered some threatened or actual injury resulting from the alleged illegal action. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As a reflection of this limitation, the issue of mootness will preclude jurisdiction "when the issues presented are no longer 'live'." *Powell v. McCormack*, 395 U.S.2d 486, 496 (1969); see also, *United States Parole Commission v. Geraghty*, 445 U.S. 394, 397 (1980).

In *Canton v. Harris*, 489 U.S. 378, 107 S.Ct. 1197 (1989) the Supreme Court held that municipal liability will attach under § 1983 only where "a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation" is shown to exist. *Canton*, 109 S.Ct. at 1203. Therefore, it is clear that in order to hold the municipality liable under § 1983 one must first show that the conduct of the city employee amounted to a constitutional deprivation. Once the constitutional harm or deprivation has been established, the claimant must then establish a causal link between the deprivation and the municipality's policy or custom. As applied here, this action has been rendered moot and no causal link between a municipal policy and alleged constitutional deprivation can be shown to exist because Officers Bewley and Traweck have been found not to have violated Plaintiffs' constitutional rights.

Similarly, in the *Los Angeles v. Heller*, 475 U.S. 796, 800 (1986) the Supreme Court specifically stated that a cause of action for damages against a municipality under §1983 will not lie where a jury has concluded that the municipality's police officer did not inflict "constitutional harm" to the claimant. In *Heller*, the Plaintiff brought a civil rights action against a municipality, members of the city police commission and two city police officers. The Plaintiff based his claim on the assertion that he had been arrested without probable cause and was the victim of excessive or unreasonable force. *Id.* at 798. However, the jury

returned its verdict in favor of the police officer. Thereafter, the district court in *Heller* dismissed the action against the municipality and public offices concluding that if the police officer had been exonerated there could be no basis for assertion of liability against the other Defendants. *Heller*, 106 S.Ct. at 1572.

The factual similarities in the judgments rendered in *Heller* and the *Andert v. Bewley* case are factually and legally analogous. In *Andert v. Bewley*, Defendant Traweck successfully obtained a directed verdict finding that "Plaintiffs had been fully heard with respect to all issues related to their liability claims against Larry Traweck and that, nonetheless, there was no legally sufficient evidentiary basis for a reasonable jury to have found for Plaintiffs against Larry Traweck on the theory of recovery urged by Plaintiffs against him." (Appendix, Memorandum Opinion & Order, p. 6) Accordingly, the district court concluded that Plaintiffs failed to establish a prima facie case of liability sufficient to submit issues to a jury because Plaintiffs failed to adduce any evidence that any injury suffered by any of the Plaintiffs resulted from any conduct on the part of Larry Traweck that was objectively unreasonable or that was of an excessive nature or beyond that which a reasonably prudent officer would have done in the same situation. *Id.*

On the other hand, issues with respect to Officer Bewley's conduct were submitted to the jury and the jury returned a verdict specifically finding that Officer Bewley had not caused any harm to the Andert/Lealos Plaintiffs. Specifically, the following question was submitted: "Do you find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head constituted a use of force by Greg Bewley that was clearly excessive to the need existing on the occasion in question, taking into account all facts and circumstances existing at the time the force was used?" (Appendix, Verdict of the Jury, Question No. 1) To this question the jury unanimously answered "No". Thereafter, a take-nothing judgment in favor of Officer



Bewley and against Plaintiffs was signed by the court on April 21, 1992. (Appendix, Final Judgment) Consequently, the claims of the Andert/Lealos Plaintiffs against the City of Grapevine are rendered moot because the take-nothing judgments in favor of Officers Bewley and Traweck preempt Plaintiffs' allegations here that misconduct by the officers resulted from a municipal policy or custom and resulted in the police officer depriving Plaintiffs of their constitutional rights. Therefore, the claims of the Andert/Lealos Plaintiffs against the City of Grapevine should be dismissed as moot.

### CONCLUSION

The Fifth Circuit correctly affirmed the district court's dismissal in favor of Defendant City of Grapevine, Texas, because Plaintiffs failed to state a cause of action on which relief could be granted. The basic premise of Plaintiffs' complaint fails because they failed to factually state a claim under 42 U.S.C. § 1983.

For the reasons stated, the United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari; leave the judgments of the Fifth Circuit and district court undisturbed, with costs taxed to Petitioners.

Respectfully submitted,

FOWLER, WILES, NORTON  
& KEITH, L.L.P.

By: Kevin J. Keith  
Kevin J. Keith  
David L. Benford  
1900 Cityplace Center  
2711 North Haskell  
Dallas, Texas 75202  
214/841-3000 Telephone  
214/841-3099 Telecopier

### CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing pleading has been forwarded to all counsel of record on this the \_\_\_\_ day of October, 1992.

Kevin J. Keith  
Kevin J. Keith

IN THE  
**United States District Court**  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

GERALD ANDERT, ET AL, <i>Plaintiffs,</i>	}	CIVIL ACTION No. 4-91-068-
vs.		
GREG BEWLEY, ET AL, <i>Defendants</i>		

**MEMORANDUM OPINION**  
**and**  
**ORDER**

This action was brought by Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, by and through his next friends Kevin Lealos and Jerri Lealos, Tavor Lealos, by and through her next friends Kevin Lealos and Jerri Lealos, Pat Lealos and Don Andert, plaintiffs, against defendants, Greg Bewley and Larry Traweek, on January 30, 1991, to obtain relief under 42 U.S.C. § 1983 for alleged violations by defendants of rights guaranteed to plaintiffs by the United States Constitution.

Plaintiffs alleged that defendants are police officers who participated in execution of a search warrant at premises occupied by the plaintiffs ("Lealos residence"). One of the two sets of plaintiffs who were involved in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 755 F.Supp. 726 (N.D. Tex. 1991), *aff'd* 924 F.2d 1054 (5th Cir. 1992), are the same persons who are the plaintiffs in this action; and the police activity involved in this action is the same police activity with which the court dealt as to these persons in *Leatherman*.

The sole theory of recovery alleged by plaintiffs against Greg Bewley was that he was a participant in the search of the Lealos

residence the evening of January 30, 1989, and that while so engaged he caused an injury to Gerald Andert by use of excessive force. The heart of the cause of action alleged against Greg Bewley is as follows:

**Liability Alleged Against Defendant Bewley**

15.

... Specifically, Plaintiff Gerald Andert alleges that the use of force by Defendant Bewley when seizing Plaintiff caused 1) a significant injury to Plaintiff, which 2) resulted directly and only from the alleged use of force that was clearly excessive to the need; and 3) that the excessiveness of the force used by Defendant Bewley was objectively unreasonable under the circumstances. *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (en banc).

16.

Plaintiff Gerald Andert further alleges that Defendant Bewley was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Bewley was therefore acting "under color of law" when he violated the Plaintiff's constitutional rights.

17.

To state a claim under 42 U.S.C. Section 1983 plaintiffs need only allege two things: 1) the violation of a constitutional right, and 2) that the person alleged to have violated their rights was acting under color of law. *Gomez v. Toledo*, 446 U.S. 634, 640 (1980). The United States Court of Appeals for the Fifth Circuit has modified *Gomez v. Toledo* to require that

Plaintiffs in Section 1983 actions anticipate the possibility of an affirmative defense based on qualified immunity, and in this connection the Fifth Circuit requires Section 1983 plaintiffs to plead the basis of their claims in a manner "sufficiently specific to remove the cloak of protection afforded by an immunity defense." *Geter v. Fortenberry*, 882 F.2d 167, 170 (5th Cir. 1989) ("*Geter II*")

18.

For the purposes of satisfying the pleading requirement referred to in the preceding paragraph, Plaintiff Gerald Andert would further allege that the actions taken by Defendant Bewley when seizing Plaintiff violated clearly established law in existence at the time which prohibited use of force which causes severe injury, is grossly disproportionate to the need for action under the circumstances, and which is inspired by malice rather than merely careless or unwise excess of zeal so that it amounts to an abuse of official power that shocks the conscience. *Mouille v. City of Live Oak*, 918 F.2d 548, 551 (5th Cir. 1990). Plaintiff Gerald Andert alleges that the stitches required to treat his head wound satisfies the "severe injury" element, and that in the absence of any resistance or provocation during the seizure by Plaintiff, that clearly established law would have provided an objectively reasonable officer in Defendant Bewley's position "with the ability reasonably to anticipate [that his] conduct [might] give rise to liability for damages." *Melear v. Spears*, 862 F.2d 117, 1183 (5th Cir. 1989).

Plaintiffs' Original Complaint at 6-8. As reflected by the trial evidence, Gerald Andert's claim of use by Greg Bewley of excessive force is related to a blow Greg Bewley struck on Gerald Andert's head with a flashlight immediately after Greg Bewley entered the residence in execution of the search warrant.

The heart of the liability allegations made by plaintiffs against Larry Traweek are as follows:



### Liability Alleged Against Defendant Traweek

19.

When the United States Congress enacted Title 42, it intended to create a remedy in damages in favor of any person who has been subjected to the deprivation of a federal constitutional or statutory right by another person, or a governmental entity, who when violating the United States Constitution or laws has acted "under color of law." All Plaintiffs named herein allege Defendant Traweek is liable to them for the right to be free from unreasonable seizure protected by the Fourth Amendment, as alleged herein at paragraph 14. These Plaintiffs base their right to recovery from Defendant Traweek on the remedy created by the United States Congress when it enacted Title 42, United States Code, Section 1983.

20.

All Plaintiffs herein further allege that Defendant Traweek was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Traweek was therefore acting "under color of law" when he violated the Plaintiffs' constitutional rights.

21.

For the purpose of satisfying the pleading requirement of the United States Court of Appeals for the Fifth Circuit requiring plaintiffs to anticipate possible assertions of an affirmative defense based on qualified immunity, referred to herein at paragraph 17, the Plaintiffs alleging liability against Defendant Traweek would respectfully allege further that under clearly established law in existence when Defendant Traweek took the

actions challenged by Plaintiffs, that a reasonable officer would have known that to detain and interrogate individuals inside a private residence for one and one half hours, after discovering beyond a reasonable doubt that no legal basis existed for such detention or interrogation, would likely "give rise to liability for damages." *Melear v. Spears*, 862 F.2d 117, 1183 (5th Cir. 1989).

*Id.* at 9-10. The trial evidence provided specificity in the form of testimony that while at the scene of the search Larry Traweek explained to occupants of the residence the reason for the search, was present in something of a supervisory capacity, did not engage in significant, if any, search himself, and did not cause the presence of the officers at the residence to be terminated at an earlier time.

Plaintiffs do not contest validity of the search warrant. It was issued on the basis of an affidavit of a police officer stating that the affiant was of the belief that at the Lealos residence there were "controlled substances and chemicals used to manufacture controlled substances." Defendants' ex. 6 at 1. The search warrant itself commanded search of the Lealos residence, "including all other structures, and places on the premises," for controlled substances "alleged to be kept and concealed." Defendants' ex. 4.

Plaintiffs do not seek by their complaint recovery from any person other than Greg Bewley and Larry Traweek, the sole defendants, nor do plaintiffs allege any theory of liability against Bewley or Traweek, other than the theories mentioned above. No liability was sought by the complaint to be imposed on Bewley or Traweek for the conduct of other persons involved in the execution of the search warrant.

The case was tried to the jury, commencing on April 20, 1992. After plaintiffs announced that they had rested, except for an offer of proof by one witness on the issue of damages only and the making of a "bill", Larry Traweek moved for motion for judgment

as a matter of law, as contemplated by Fed. R. Civ. R. 50(a). The court granted the motion because of the court's conclusion that plaintiffs had been fully heard with respect to all issues related to their liability claims against Larry Traweek and that, nonetheless, there was no legally sufficient evidentiary basis for a reasonable jury to have found for plaintiffs against Larry Traweek on the theory of recovery urged by plaintiffs against him. The court has concluded that plaintiffs failed to present evidence raising a case of liability against Larry Traweek because they failed to adduce any evidence that any injury suffered by any of the plaintiffs resulted from any conduct on the part of Larry Traweek that was objectively unreasonable or that was of an excessive nature or beyond that in which a reasonable officer, faced with the same situation facing Larry Traweek on the occasion in question, would have engaged. Moreover, the court has concluded from the evidence received during plaintiffs' trial presentation that the conduct of Larry Traweek was subject to the qualified immunity defense, as it is explained in *Mouille v. City of Live Oak*, 918 F.2d 548, 551-52 (5th Cir. 1990). Because the conduct in question occurred prior to the opinion of the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), the standards set forth in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A January 1981), are applicable to the qualified immunity inquiry. Evidence adduced during plaintiffs' case made clear that Larry Traweek's conduct on the occasion in question was not "grossly disproportionate to the need for action under the circumstances" and that it was not "inspired by malice . . . that it amounted to an abuse of official power that shocks the conscience. . . ." *Mouille*, 918 F.2d at 551.

The case of plaintiffs against Greg Bewley went to the jury for resolution of disputed facts by a special verdict as contemplated by Fed. R. Civ. P. 49(1). The jury found against plaintiffs on the first of a series of questions inquiring about existence of the elements of an excessive force cause of action, as such a cause of action is defined in *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir.

1989). *See also Mouille*, 918 F.2d at 551. The jury's answer to Question No. 1 was that the jury was unable to find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head was a use by Greg Bewley of force that was clearly excessive to the need existing on the occasion in question. This jury finding compels entry of judgment in favor of Greg Bewley against Gerald Andert. Moreover, the jury found in answer to Question No. 5 that Greg Bewley's conduct in striking Gerald Andert was qualified immune. The court recognizes that the issue of qualified immunity normally is an issue of law to be determined by the court. In this case, there is uncertainty as to whether disputed fact elements exist as to the qualified immunity defense. If the matter was proper for resolution by the jury, the jury has resolved it in favor of Greg Bewley. If the conclusion were to be reached that the issue is one to be resolved by the court as a legal proposition, the court would conclude that the conduct of Greg Bewley about which Gerald Andert complains was qualified immune. The only reasonable conclusion that could be reached from the evidence is that Greg Bewley was not inspired by malice. While carelessness or unwise excess of zeal might be present (though the court is not saying that it is), there clearly was no malice on Greg Bewley's part and there certainly was no conduct on his part that "amounted to an abuse of official power that shocks the conscience." *Mouille* 918 F.2d at 551.

For the reasons given above, judgment should be entered for defendants, denying plaintiffs any recovery against either of them.

THE COURT SO ORDERS.

SIGNED April 21, 1992.

---

JOHN McBRYDE  
United States District Judge

IN THE  
**United States District Court**  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

GERALD ANDERT, ET AL, <i>Plaintiffs,</i>	}	CIVIL ACTION No. 4-91-068-
vs.		
GREG BEWLEY, ET AL, <i>Defendants</i>		

**FINAL JUDGMENT**

Consistent with the memorandum opinion and order signed by the court on this date,

The court ORDERS, ADJUDGES and DECREES that Plaintiffs, Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, by and through his next friends Kevin Lealos and Jerri Lealos, Tavor Lealos, by and through her next friends Kevin Lealos and Jerri Lealos, Pat Lealos and Don Andert, have and recover nothing from defendants, Greg Bewley and Larry Traweck, that plaintiffs' causes of action against defendants be, and are hereby, dismissed, and that defendants each have and recover costs of court incurred by them from plaintiffs, jointly and severally.

SIGNED April 21, 1992.

---

JOHN McBRYDE  
United States District Judge

IN THE  
**United States District Court**  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

GERALD ANDERT, ET AL, <i>Plaintiffs,</i>	}	CIVIL ACTION No. 4-91-068-
vs.		
GREG BEWLEY, ET AL, <i>Defendants</i>		

**VERDICT OF THE JURY**

We the Jury, return our answers to the following questions as our verdict in this case.

**QUESTION NO. 1:**

Do you find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head constituted a use of force by Greg Bewley that was clearly excessive to the need existing on the occasion in question, taking into account all facts and circumstances existing at the time the force was used?

Answer "Yes" or "No."

**ANSWER: NO**

If you answered Question No. 1 "Yes," then answer Question No. 2; otherwise, do not answer Question No. 2.

**QUESTION NO. 2:**

Do you find from a preponderance of the evidence that the excessiveness of the force that was used by Greg Bewley in striking Gerald Andert on the head, if you have so found, was objectively unreasonable?



You are instructed that in determining whether the excessiveness of the force used by Greg Bewley in striking Gerald Andert on the head was "objectively unreasonable," you shall consider the matter from the standpoint of a reasonable officer on the scene, faced with the same circumstances that actually existed at the time, without regard to Greg Bewley's underlying intent or motivation, rather than with the 20/20 vision of hindsight, and you will allow for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Answer "Yes" or "No."

ANSWER: \_\_\_\_\_

If you have answered Question No. 2 "Yes," then answer Question No. 3; otherwise, do not answer Question No. 3.

#### QUESTION NO. 3:

Do you find from a preponderance of the evidence that Gerald Andert sustained a significant injury as a direct result, and only from the use of, the excessive force you have found to exist in answer to question No. 1?

Answer "Yes" or "No."

ANSWER: \_\_\_\_\_

If you have answered Question No. 3 "Yes," then answer Question No. 4; otherwise, do not answer Question No. 4.

#### QUESTION NO. 4:

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would fairly and reasonably compensate Gerald Andert for his damages, if any, which were a direct and proximate result of the force used by Greg Bewley in striking Gerald Andert on the head?

You are instructed that in answering Question No. 4 you shall take into account any physical pain and suffering and mental anguish you find from a preponderance of the evidence Gerald Andert sustained by reason of the force used by Greg Bewley in striking him on his head, and nothing else.

Answer in dollars and cents, or "None," in the blank space provided below.

ANSWER: \_\_\_\_\_

#### QUESTION NO. 5:

Do you find from a preponderance of the evidence that Greg Bewley's conduct in striking Gerald Andert on the head was qualified immune?

You are instructed that an officer's conduct is "qualified immune" if a reasonable officer, situated as Greg Bewley was situated on the occasion in question, could have concluded that his conduct did not violate Gerald Andert's right to be free from excessive force. You are further instructed that on the occasion in question Gerald Andert's right to be free from excessive force was to be free from severe injuries inflicted on him by a force that was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely carelessness or unwise excess of zeal, so that it amounted to an abuse of official power that shocks the conscience. You are further instructed that "malice" exists if the actor acts with evil motive or intent, or recklessly or with callous indifference to the injured party's right to be free from the use of excessive force during the course of a search and seizure.

Answer "Yes" or "No."

ANSWER: Yes

4/21/92

(Date)

FOREPERSON

4/21/92

(Date)

JOHN McBRYDE

United States District Judge

FRANKLIN D. LAMARCA, et al.

Defendants

VARIANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.

Respondents

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

MEMORANDUM FOR THE VARIANT COUNTY  
NARCOTICS INTELLIGENCE AND COORDINATION  
UNIT, et al., vs. FRANKLIN D. LAMARCA,  
et al.

UNIT ATTORNEY  
FRANKLIN D. LAMARCA

UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE

UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE

UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE  
UNIT & SINGLE



## QUESTIONS PRESENTED

1. Whether a complaint against a municipality under 42 U.S.C. § 1983 that alleges no factual grounds from which a court can infer that a municipal policy caused the alleged constitutional violation states a claim upon which relief can be granted within the meaning of Rule 12(b)(6) of the Federal Rules of Civil Procedure.
2. Whether a requirement that, in order to survive a Rule 12(b)(6) motion to dismiss, a complaint against a municipality under 42 U.S.C. § 1983 must allege facts from which a court can infer that a municipal policy caused the alleged constitutional violation contravenes the Rules Enabling Act.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	v
STATEMENT .....	1
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	9
I. A COMPLAINT AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983 THAT ALLEGES NO FACTUAL GROUNDS FROM WHICH A COURT CAN INFER THAT A MUNICIPAL POLICY CAUSED THE ALLEGED CONSTITUTIONAL VIOLATION DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED .....	9
A. The Federal Rules of Civil Procedure Require A Plaintiff To Plead Facts From Which A Court Can Infer A Legally Cognizable Claim .....	10
1. Rule 8 Requires That the Complaint Set Out Facts Upon Which the Claim Rests .....	10
2. The Adequacy of a Complaint Must Be Evaluated in Light of Applicable Law .....	12
3. Rule 11 Requires Investigation Prior to Filing Sufficient to Allow the Required Facts To Be Pleaded .....	14
B. Complaints Against Municipalities Under § 1983 Must Be Predicated On More Than A Theory Of <i>Respondeat Superior</i> .....	15

## TABLE OF CONTENTS - Continued

	Page
1. Municipalities Are Absolutely Immune From <i>Respondeat Superior</i> Liability . . . . .	16
2. Municipal Defendants' Immunity From <i>Respondeat Superior</i> Liability Is Meaningless If They Are Required to Defend Suits Based on That Theory . . . . .	19
C. The Fifth Circuit's Pleading Requirement Properly Applies The Requirements of Rule 8 and Rule 11 of The Federal Rules of Civil Procedure to § 1983 Claims Against Municipalities . . . . .	22
II. A REQUIREMENT THAT, IN ORDER TO SURVIVE A RULE 12(b)(6) MOTION, A § 1983 COMPLAINT AGAINST A MUNICIPALITY MUST ALLEGE FACTS FROM WHICH A COURT CAN INFER MUNICIPAL LIABILITY DOES NOT VIOLATE THE RULES EN- ABLING ACT . . . . .	27
III. THE CLAIMS ARISING OUT OF THE ANDERT SEARCH ARE COLLATERALLY ESTOPPED . . . . .	29
CONCLUSION . . . . .	32

## TABLE OF AUTHORITIES

Cases	Page
<i>Alfaro Motors, Inc. v. Ward</i> , 814 F.2d 883 (2d Cir. 1987) . . . . .	13
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980) . . . . .	30, 31
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) . . . . .	20, 21, 26
<i>Andert v. Bewley</i> , CA4-91-068 (N.D. Tex. Apr. 21, 1992). . . . .	3, 30
<i>Arnold v. Jones</i> , 891 F.2d 1370 (8th Cir. 1989) . . . . .	13
<i>Associated General Contractors, Inc. v. California State Council of Carpenters</i> , 459 U.S. 519 (1983) . . . . .	12
<i>Baldwin County Welcome Center v. Brown</i> , 466 U.S. 147 (1984) . . . . .	10
<i>Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation</i> , 402 U.S. 313 (1971) . . . . .	31
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977) . . . . .	12
<i>Branch v. Tunnell</i> , 937 F.2d 1382 (9th Cir. 1991) . . . . .	13
<i>Brower v. County of Inyo</i> , 489 U.S. 593 (1989) . . . . .	22
<i>Brower v. County of Inyo</i> , 817 F.2d 540 (9th Cir. 1987) . . . . .	22
<i>Brubaker v. City of Richmond</i> , 943 F.2d 1363 (4th Cir. 1991) . . . . .	23
<i>Burlington Northern Railroad Co. v. Woods</i> , 480 U.S. 1 (1987) . . . . .	8, 28
<i>Business Guides, Inc. v. Chromatic Communications Enter., Inc.</i> , 111 S.Ct. 922 (1991) . . . . .	9, 15, 28, 29
<i>Butz v. Economou</i> , 438 U.S. 478 (1978). . . . .	19, 20, 21
<i>Caldwell v. City of Elwood</i> , 959 F.2d 670 (7th Cir. 1992) . . . . .	22
<i>Car Carriers, Inc. v. Ford Motor Co.</i> , 745 F.2d 1101 (7th Cir. 1984), <i>cert denied</i> , 470 U.S. 1054 (1985) . . . . .	11
<i>Chahal v. Paine Webber, Inc.</i> , 725 F.2d 20 (2d Cir. 1984) . . . . .	11



## TABLE OF AUTHORITIES - Continued

	Page
<i>Chapman v. City of Detroit</i> , 808 F.2d 459 (6th Cir. 1986) . . . . .	13
<i>City of Canton v. Harris</i> , 489 U.S. 378 (1989) . . . . .	<i>passim</i>
<i>City of Los Angeles v. Heller</i> , 475 U.S. 796 (1986) . . . . .	30
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) . . . . .	19
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985) . . . . .	8, 16, 22
<i>City of St. Louis v. Prapromik</i> , 485 U.S. 112 (1988) . . . . .	16
<i>Colburn v. Upper Darby Township</i> , 838 F.2d 663 (3d Cir. 1988) . . . . .	24
<i>Collins v. City of Harker Heights</i> , 112 S. Ct. 1061 (1992) . . . . .	16, 18
<i>Commonwealth of PA ex rel. Zimmerman v.</i> <i>Pepsico, Inc.</i> , 836 F.2d 173 (3d Cir. 1988) . . . . .	13
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957) . . . . .	7, 9, 10
<i>Cooter &amp; Gell v. Hartmarx Corp.</i> , 496 U.S. 2447 (1990) . . . . .	28, 29
<i>Davis v. Passman</i> , 442 U.S. 228 (1979) . . . . .	11
<i>Davis v. Scherer</i> , 468 U.S. 183 (1984) . . . . .	20
<i>Dewey v. University of New Hampshire</i> , 694 F.2d 1 (1st Cir. 1982), <i>cert.</i> <i>denied</i> , 461 U.S. 944 (1983) . . . . .	13
<i>Dioguardi v. Durning</i> , 139 F.2d 774 (2d Cir. 1944) . . . . .	11
<i>Elliott v. Foufas</i> , 867 F.2d 877 (5th Cir. 1989) . . . . .	13
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) . . . . .	6, 13, 25
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976) . . . . .	14
<i>Fraire v. City of Arlington</i> , 957 F.2d 1268 (5th Cir. 1992) . . . . .	22
<i>Freedman v. City of Allentown</i> , 853 F.2d 1111 (3d Cir. 1988) . . . . .	13
<i>Fullman v. Graddick</i> , 739 F.2d 553 (11th Cir. 1984) . . . . .	13

## TABLE OF AUTHORITIES - Continued

	Page
<i>Geter v. Fortenberry</i> , 849 F.2d 1550 (5th Cir. 1988) . . . . .	25
<i>Gomez v. Toledo</i> , 446 U.S. 635 (1980) . . . . .	16, 25
<i>Gutierrez v. City of Hialeah</i> , 729 F. Supp. 1329 (S.D. Fla. 1990) . . . . .	23
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965) . . . . .	27
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) . . . . .	19, 20, 21, 26
<i>Hishon v. King &amp; Spaulding</i> , 467 U.S. 69 (1984) . . . . .	12
<i>Hobson v. Wilson</i> , 737 F.2d 1 (D.C. Cir. 1984), <i>cert. denied</i> , 470 U.S. 1084 (1985) . . . . .	13
<i>Hunter v. Bryant</i> , 112 S. Ct. 534 (1991) . . . . .	20
<i>Jacquez v. Procunier</i> , 801 F.2d 789 (5th Cir. 1986) . . . . .	6
<i>Kraemer v. Grant County</i> , 892 F.2d 686 (7th Cir. 1990) . . . . .	24
<i>Kwoun v. Southeast Missouri Professional</i> <i>Standards Review Org.</i> , 622 F. Supp. 520 (E.D. Mo. 1985), <i>aff'd</i> , 811 F.2d 401 (8th Cir. 1987), <i>cert. denied</i> , 486 U.S. 1022 (1988) . . . . .	12
<i>Leatherman v. Tarrant County Narcotics</i> <i>Intelligence &amp; Coordination Unit</i> , 954 F.2d 1054 (5th Cir. 1992) . . . . .	<i>passim</i>
<i>Leatherman v. Tarrant County Narcotics</i> <i>Intelligence &amp; Coordination Unit</i> , 755 F. Supp. 726 (N.D. Tex. 1991) . . . . .	5, 6, 23
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) . . . . .	20
<i>McLain v. Real Estate Bd. of New Orleans, Inc.</i> , 444 U.S. 232 (1980) . . . . .	12
<i>Mississippi Pub. Corp. v. Murphree</i> , 326 U.S. 438 (1946) . . . . .	28
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) . . . . .	20
<i>Monell v. New York City Dep't of Social</i> <i>Services</i> , 436 U.S. 658 (1978) . . . . .	<i>passim</i>
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961) . . . . .	15

## TABLE OF AUTHORITIES - Continued

	Page
<i>Morrison v. City of Baton Rouge</i> , 761 F.2d 242 (5th Cir. 1985) . . . . .	23
<i>Olivieri v. Thompson</i> , 803 F.2d 1265 (2d Cir. 1980) . . . . .	24
<i>Palmer v. City of San Antonio</i> , 810 F.2d 514 (5th Cir. 1987) . . . . .	6, 22
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986) . . . . .	11
<i>Polk County v. Dodson</i> , 454 U.S. 312 (1981) . . . . .	14
<i>Renne v. Geary</i> , 111 S.Ct. 2331 (1991) . . . . .	13
<i>Revene v. Charles County Comm.</i> , 882 F.2d 870 (4th Cir. 1989) . . . . .	13
<i>Rhodes v. Robinson</i> , 612 F.2d 766 (3d Cir. 1979) . . . . .	12
<i>Rodgers v. Lincoln Towing Serv., Inc.</i> , 771 F.2d 194 (7th Cir. 1985) . . . . .	13, 23
<i>Rodriguez v. Avita</i> , 871 F.2d 552 (5th Cir.), cert. denied, 493 U.S. 854 (1989) . . . . .	23, 29
<i>Shemtob v. Shearson, Hammill &amp; Co., Inc.</i> , 448 F.2d 442 (2d Cir. 1971) . . . . .	13
<i>Sibbach v. Wilson &amp; Co.</i> , 312 U.S. 1 (1941) . . . . .	27
<i>Siegert v. Gilley</i> , 111 S. Ct. 1789 (1991) . . . . .	passim
<i>Sooner Prod. Co. v. McBride</i> , 708 F.2d 510 (10th Cir. 1983) . . . . .	13
<i>St. Josephs Hosp. v. Hospital Corp. of America</i> , 795 F.2d 948 (11th Cir. 1986) . . . . .	11
<i>Strauss v. City of Chicago</i> , 760 F.2d 765 (7th Cir. 1985) . . . . .	24, 25
<i>The Dartmouth Review v. Dartmouth College</i> , 889 F.2d 13 (1st Cir. 1989) . . . . .	11
<i>Walker v. South Central Bell Tel. Co.</i> , 904 F.2d 275 (5th Cir. 1990) . . . . .	11
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975) . . . . .	13
<i>Wolman v. Tose</i> , 467 F.2d 29 (4th Cir. 1972) . . . . .	12

## TABLE OF AUTHORITIES - Continued

	Page
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) . . . . .	19
<b>Statutes</b>	
28 U.S.C. § 2072 . . . . .	8, 27, 28
42 U.S.C. § 1983 . . . . .	passim
<b>Rules</b>	
Fed. R. Civ. P. 8(a)(2) . . . . .	8, 10, 26, 29
Fed. R. Civ. P. 11 . . . . .	14, 23, 26, 28
Fed. R. Civ. P. 12(b)(6) . . . . .	passim
Fed. R. Civ. P. 27(a) . . . . .	23
Fed. R. Civ. P. 56 . . . . .	3, 5, 26
<b>Miscellaneous</b>	
2A James W. Moore & Jo D. Lucas, <i>Moore's Federal Practice</i> ¶ 8.13 (1992) . . . . .	12
5 Charles A. Wright & Arthur R. Miller <i>Federal Practice and Procedure</i> § 1201 (1990) . . . . .	11
5 Charles A. Wright & Arthur R. Miller, <i>Federal Practice &amp; Procedure</i> § 1216 (1990) . . . . .	12
Advisory Committee on Rules for Civil Procedure, <i>Report of the Advisory Committee</i> (Oct. 1955) . . . . .	11

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

---

No. 91-1657

---

CHARLENE LEATHERMAN, *et al.*,  
*Petitioners,*

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

---

BRIEF FOR RESPONDENTS  
TARRANT COUNTY NARCOTICS INTELLIGENCE AND  
COORDINATION UNIT, TARRANT COUNTY, TEXAS,  
DON CARPENTER, AND TIM CURRY

---

**STATEMENT**

This § 1983<sup>1</sup> action arises out of two separate incidents

---

<sup>1</sup> 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any



involving the execution of search warrants by law enforcement officers with the Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU").

The first incident on which petitioners brought suit involved TCNICU's execution of a search warrant for narcotics in petitioners Charlene and Kenneth Leatherman's residence. After procuring the warrant, the officers went to the Leatherman property, which was unoccupied, except for two dogs. In the course of conducting their search, the officers shot the dogs. The officers did not find any narcotics or the drug lab they sought. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1056 (5th Cir. 1992) (Cert. Pet. App. 1a, 4a).

The second incident involved a search warrant for illegal drugs at the Anderts' property.<sup>2</sup> When the officers entered the house, they found Gerald Andert and his family. After entry one of the officers struck Mr. Andert on the head. The search did not turn up any narcotics. *Id.* at 1056 (Cert. Pet. App. 5a).

On November 22, 1989, petitioners Charlene and Kenneth Leatherman filed a complaint against TCNICU and Tarrant County in state court (J.A. 3).<sup>3</sup> The complaint alleged that TCNICU officers had detained the Leathermans and searched

---

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>2</sup> The officers had separately secured warrants for both the Leatherman and Andert homes because they had smelled a strong chemical odor associated with the manufacturing of amphetamines in the vicinity of those homes (J.A. 79, 100-01).

<sup>3</sup> The Andert petitioners, who were involved in the second search incident, did not join in the original complaint.

their residence without probable cause, and violated, among other rights, their rights under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. The complaint further alleged that "[p]laintiffs have reason to believe" that, when the officers committed these alleged violations, they "were acting in accordance with official policy usage and custom of the TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT of the Tarrant County District Attorney's office and were therefore in the course and scope of their duties as agents, servants, and/or employees of TARRANT COUNTY, TEXAS" (J.A. 6-7).

TCNICU removed the case to federal court and then moved for dismissal under Rule 12(b)(6) or for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (J.A. 9). The district court dismissed the complaint (J.A. 19) and then vacated<sup>4</sup> that dismissal on the condition that the Leathermans amend their complaint (J.A. 26). The Leathermans filed an amended complaint on March 23, 1990, joining Gerald Andert, Kevin Lealos, Jerri Lealos, Pat Lealos, Donald Andert, and Lucy Andert as additional plaintiffs,<sup>5</sup> and Tim Curry and Don Carpenter (in

---

<sup>4</sup> The Leathermans had sought to vacate the prior Order of Dismissal and requested leave to amend in order "to conform to the technical pleading requirements under 42 U.S.C. Section 1983" (J.A. 24).

<sup>5</sup> The Andert petitioners had separately sued two of the individual officers, Greg Bewley and Larry Traweck, who had conducted the search, alleging the same constitutional violations. The case proceeded to a jury trial, at which the district court granted Officer Traweck a directed verdict and sustained the officer's qualified immunity claim. The case against Officer Bewley went to the jury, which found that petitioners had failed to prove that the officer had used excessive force and sustained the officer's qualified immunity defense. See *Andert v. Bewley*, CA4-91-068 (N.D. Tex. Apr. 21, 1992). The district court's order is attached as the Appendix to City of Grapevine Texas' Reprinted Brief in Opposition ("Grapevine Cert. Opp. App." 1). The legal effects of this are discussed in part III, *infra*.

their official capacities as Director of TCNICU and Sheriff, respectively, of Tarrant County), and the Cities of Lake Worth and Grapevine, Texas, as additional defendants (J.A. 28).

Other than the policy or practice of seeking and obtaining allegedly "invalid" search warrants based on an "odor associated" with clandestine drug manufacture, the only other allegations of unconstitutional policy were the following conclusory allegations related to allegedly inadequate training:

1. The Leathermans claimed that Tarrant County and TCNICU were liable under 42 U.S.C. § 1983 for an unreasonable search of their premises because:

[Defendants] failed to formulate and implement an adequate policy to train [their] officers on the proper manner in which to respond when confronted by family dogs when executing search warrants; and that in the light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of [Defendants], by and through [their] official policy maker[s] [Defendants Curry and Carpenter], demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train. Amd. Cpl. ¶¶ 23-24 (J.A. 37-38).

2. Both groups of petitioners also alleged generally:

[T]hat [Defendants] failed to formulate and implement an adequate policy to train [their] officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in the light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of [Defendants], by and through [their] official policy maker[s] [Defendants Curry and Carpenter], demonstrates a deliberate indifference to the Constitutional rights of persons

likely to be affected by such failure to train. Amd. Cpl. ¶¶ 26-27; 31-33 (J.A. 39-40; 43-45).

All of petitioners' allegations against the municipal defendants were similarly conclusory and devoid of factual support. See Amd. Cpl. ¶¶ 24-28, 31-34; 36-38 (J.A. 38-41, 43-45, 46-48).

Respondents (except Lake Worth) moved to dismiss the amended complaint under Rule 12(b)(6). Tarrant County, TCNICU, Tim Curry, and Don Carpenter also moved for summary judgment under Rule 56. The district court granted all of the motions and ordered *sua sponte* that the complaint against Lake Worth be dismissed. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 755 F. Supp. 726, 727 (N.D. Tex. 1991) (Cert. Pet. App. 25a, 26a).

The district court emphasized that the amended complaint did not satisfy the Fifth Circuit's requirement that § 1983 complaints set forth the facts upon which the claim rests:

The inadequate training allegations are inspired by the holding of the Supreme Court in *City of Canton v. Harris*, 489 U.S. 378 (1989). Plaintiffs allege, in a conclusory way, the elements of a § 1983 inadequate training cause of action, as defined in *City of Canton*, against each of the public entity defendants.

*Leatherman*, 755 F. Supp. at 729 (Cert. Pet. App. 33a-34a). The court further noted that the petitioners' "custom and practice" allegations relating to odor-based search warrants simply incorporated the words from *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), that were relevant to that cause of action. *Leatherman*, 755 F. Supp. at 729 (Cert. Pet. App. 34a). Because the complaint's allegations were "blunderbuss in character and describe[d] only isolated incidents 'decked out with general claims of inadequate training . . . ' and the like," *id.* at 730 (Cert. Pet. App. 38a) (citation omitted), the

district court held that under the Fifth Circuit's pleading requirements the complaint should be dismissed for failure to state a claim.

The district court also granted respondents' summary judgment motion because petitioners' affidavits, which were the only evidence that petitioners had offered, "shed no light whatsoever on the factors that are so crucial to establishment of § 1983 liability against a public entity." *Id.* at 733 (Cert. Pet. App. 48a). The district court was also unpersuaded by petitioners' contentions that they needed additional discovery. The court observed that, although petitioners had had "ample opportunity to engage in full discovery" since they filed suit in December 1989, the only discovery request that they had made was limited to the results of TCNICU's execution of odor-based search warrants. *Id.* (Cert. Pet. App. 52a). Thus, the court concluded: "Plaintiffs simply have not come forward with any evidence to satisfy the summary judgment burden that was cast on them once defendants made their Rule 56 challenge." *Id.* at 733 (Cert. Pet. App. 48a-49a).

The Fifth Circuit affirmed the district court's dismissal of petitioners' complaint under Rule 12(b)(6). *Leatherman*, 954 F.2d at 1058 (Cert. Pet. App. 14a). The court explained that in § 1983 cases, it applied a so-called "heightened pleading requirement," which had originated in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), a case involving claims against state actors in their official capacities. The requirement has also been applied to claims against defendant officials with qualified immunity defenses, *see, e.g., Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986), and to claims against municipal defendants, *see, e.g., Palmer v. City of San Antonio*, 810 F.2d 514, 516-17 (5th Cir. 1987). Under this rule, a § 1983 claim against a municipal defendant must allege facts "that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible." *Leatherman*, 954 F.2d at 1055 (Cert. Pet. App. 2a).

The Fifth Circuit held that "plaintiffs' complaint falls short of alleging the requisite facts to establish a policy of inadequate training." *Id.* at 1058 (Cert. Pet. App. 12a):

Where, as here, a lawsuit brought against a municipality is predicated on inadequate training of its police officers, this circuit has cautioned that "to make such a showing in such a case, there would have to be demonstrated 'at least a pattern of similar incidents in which the citizens were injured' . . . [in order] to establish the official policy requisite to municipal liability under section 1983."

*Id.* (Cert. Pet. App. 12a-13a) (citations omitted). The court observed that: "While plaintiffs' complaint sets forth facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." *Id.*<sup>6</sup>

#### SUMMARY OF ARGUMENT

The pleading requirement applied by the Fifth Circuit in this case required petitioners to plead the grounds upon which their claims rest in compliance with the dictates of *Conley v. Gibson*, 355 U.S. 41 (1957), and Rules 8 and 11 of the Federal Rules of Civil Procedure as construed by this Court. Because petitioners' challenge rests wholly on their incorrect assumption that the Fifth Circuit "depart[ed] from the rule announced in *Conley*" (Pet. Br. at 16), it must fail.

<sup>6</sup> The court did not consider relevant *Leatherman*'s allegation that an officer had said it was "standard procedure" to shoot dogs. The court explained that the allegation "does not establish that the municipalities had a policy of killing all dogs during a search, or that the municipalities failed to adequately train officers in appropriately responding to animals encountered during a search." *Id.* at 1056 n.2 (Cert. Pet. App. 6a). Petitioners do not challenge this conclusion in this Court.



The Fifth Circuit imposed no "heightened" obligation on petitioners when it required that they plead "facts that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible." *Leatherman*, 954 F.2d at 1055.

To comply with the pleading requirement as articulated by the Fifth Circuit in this case, a plaintiff alleging that a municipality is directly liable for pursuing a policy of failing to train its police officers must plead more than one incident of the same allegedly unconstitutional conduct. This requirement is consistent with this Court's holding that "[p]roof of a single incident of unconstitutional activity is not sufficient to prove liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy . . ." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion); *id.* at 831 (Brennan, J., concurring).

Where a plaintiff's pre-filing investigation pursuant to Rule 11 of the Federal Rules of Civil Procedure has revealed neither the existence of a municipal policy nor a second incident of the allegedly unconstitutional conduct about which he complains, no cognizable claim of municipal liability under §1983 can be pleaded and no relief can be granted. The Fifth Circuit's pleading requirement recognizes this reality. Any relaxation of the pleading requirement applied in this case would subject municipalities to claims that they are liable for the acts of their employees -- liability to which municipalities have never been subjected. Dismissing such cases implements the salutary policy announced by this Court in other contexts -- a party who is immune from liability must also be immune from suit.

Dismissing such cases also does not run afoul of the Rules Enabling Act. See 28 U.S.C. § 2072 (1988). As applied by the Fifth Circuit, Rule 8 is a rule of "practice and procedure" which effects substantive rights only incidentally. See *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5 (1987). Like

Rule 11, Rule 8 "is reasonably necessary to maintain the integrity of the system of federal practice and procedure." *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 111 S. Ct. 922, 934 (1991).

Even if the Fifth Circuit's reasons for dismissing the complaint were improper, petitioners are not entitled to proceed with their claims based on the search of the Andert residence. They have already lost a jury trial on their underlying constitutional claims against the police officers. Their § 1983 claims against the municipal defendants are therefore barred.

## ARGUMENT

### I. A COMPLAINT AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983 THAT ALLEGES NO FACTUAL GROUNDS FROM WHICH A COURT CAN INFER THAT A MUNICIPAL POLICY CAUSED THE ALLEGED CONSTITUTIONAL VIOLATION DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Fifth Circuit affirmed the dismissal of petitioners' amended complaint, stressing that municipalities cannot be held liable under 42 U.S.C. § 1983 on a *respondeat superior* theory, and direct municipal liability cannot be inferred from a single instance of allegedly unconstitutional conduct. *Leatherman*, 954 F.2d at 1058 (Cert. Pet. App. 12a-13a). The Fifth Circuit properly applied the Federal Rules of Civil Procedure, which require that a complaint give fair notice of the grounds upon which a claim rests.

In this case the Fifth Circuit required nothing more than that petitioners plead the grounds upon which their claims were based in accordance with Rule 8, as defined by *Conley v. Gibson*, 355 U.S. 41 (1957), in the context of a § 1983 case against a municipality. Applied to this class of § 1983 claims, the Fifth

Circuit's so-called "heightened" pleading requirement is a misnomer.<sup>7</sup> Therefore, petitioners are incorrect in arguing that the Fifth Circuit has imposed on plaintiffs asserting § 1983 claims against municipalities a pleading obligation that exceeds the requirements of Rule 8.

**A. The Federal Rules of Civil Procedure Require A Plaintiff To Plead Facts From Which A Court Can Infer A Legally Cognizable Claim.**

**1. Rule 8 Requires That the Complaint Set Out Facts Upon Which the Claim Rests.**

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley v. Gibson*, the Court explained the meaning of that requirement:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant *fair notice* of what the plaintiff's claim is and *the grounds upon which it rests*.

355 U.S. at 47 (emphasis added); see also *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n.3 (1984). To give "fair notice" of "the grounds upon" which a claim rests, a complaint must contain more than an unadorned incantation of the

<sup>7</sup> In *Siebert v. Gilley*, 111 S. Ct. 1789 (1991), this Court considered, but did not decide, the validity of the District of Columbia Circuit's "heightened" pleading requirement as applied to cases in which defendants have a potential qualified immunity defense. The Court need not resolve the appropriate pleading requirement for qualified immunity cases here. See *infra* p. 25-26.

applicable legal standards.<sup>8</sup> A complaint must give "sufficient detail . . . so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery." *Davis v. Passman*, 442 U.S. 228, 237 n.15 (1979) (citations omitted).<sup>9</sup>

<sup>8</sup> As the 1955 Advisory Committee explained in its proposed notes to Rule 8:

"That Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated not only by the forms appended to the rules showing what should be considered as sufficient compliance with the rule, but also by other intermeshing rules . . . . The decision in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), to which proponents of an amendment to Rule 8(a) have especially referred, was not based on any holding that a pleader is not required to supply information disclosing a ground for relief. The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading."

<sup>9</sup> Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1201 at 67 n.11 (1990) (quoting Advisory Committee on Rules for Civil Procedure, *Report of the Advisory Committee* (Oct. 1955)).

<sup>9</sup> See also *Papasan v. Allain*, 478 U.S. 265, 274 (1986) (court is not "bound to accept as true a legal conclusion couched as a factual allegation"). As the lower courts have explained, a complaint must not only "provide notice of the circumstances which give rise to the claim," it must also "set forth sufficient information to outline elements of [the] claim or to permit inferences to be drawn that these elements exist." *Walker v. South Central Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990) (citation omitted); see also *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989); *St. Josephs Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 954 (11th Cir. 1986); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); *Chahal v. Paine Webber, Inc.*, 725 F.2d

## 2. The Adequacy of a Complaint Must Be Evaluated in Light of Applicable Law.

The degree of factual specificity that Rule 8 requires varies with each complaint, for "what constitutes a 'short and plain statement' depends on the circumstances of the [particular] case." 2A James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 8.13, at 8-57 (1992). Indeed, just as "a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action," *Bounds v. Smith*, 430 U.S. 817, 825 (1977), so must a court evaluate the factual sufficiency of a complaint in the context of the applicable rules of law.<sup>10</sup> "In [an antitrust] case of [great] magnitude," for example, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).<sup>11</sup> And to prevent

20, 23-24 (2d Cir. 1984); *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979); *Wolman v. Tose*, 467 F.2d 29, 33 n.5 (4th Cir. 1972); *Kwoun v. Southeast Missouri Professional Standards Review Org.*, 622 F. Supp. 520, 524 (E.D. Mo. 1985), *aff'd*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216, at 159 (1990).

<sup>10</sup> Compare *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (analyzing a Title VII complaint) with *Siegert v. Gilley*, 111 S. Ct. 1789 (1991) (determining adequacy of a § 1983 complaint).

<sup>11</sup> Cf. *McLain v. Real Estate Bd of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) ("To establish [antitrust] jurisdiction a plaintiff must allege the critical [interstate commerce] relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.").

dismissal for lack of standing, a "complainant [must] clearly . . . allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Renne v. Geary*, 111 S. Ct. 2331, 2336 (1991); *see also, e.g., Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("It is within the trial court's power to allow or to require the plaintiff to supply . . . further particularized allegations of fact deemed supportive of plaintiff's standing").<sup>12</sup> Where the governing substantive standards are either complex or stringent, the applicable pleading standards are necessarily more demanding. This is not to say that there is a "special rule" for each case, but only that the application of the rule is flexibly applied to these more demanding situations.<sup>13</sup>

<sup>12</sup> Decisions in the lower courts also illustrate how the requirements of Rule 8 vary with the substantive context in which they are applied. *See, e.g., Commonwealth of PA ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 179-83 (3d Cir. 1988) (pleading requirement for antitrust claim); *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989) (pleading requirement for RICO claim); *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984) (pleading requirement for conspiracy claim); *Shemtob v. Shearson, Hammill & Co., Inc.*, 448 F.2d 442, 445 (2d Cir. 1971) (pleading requirement for securities claim).

<sup>13</sup> It therefore is not surprising that the courts of appeals deem inadequate conclusory allegations in many types of § 1983 claims. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Dewey v. University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982), *cert. denied*, 461 U.S. 944 (1983); *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987); *Freedman v. City of Allentown*, 853 F.2d 1111, 1114-15 (3d Cir. 1988); *Revene v. Charles County Comm.*, 882 F.2d 870, 875 (4th Cir. 1989); *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 202 (7th Cir. 1985); *Arnold v. Jones*, 891 F.2d 1370, 1373 n.3 (8th Cir. 1989); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991); *Sooner Prod. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983); *Fullman v. Graddick*, 739 F.2d at 556-57.



### 3. Rule 11 Requires Investigation Prior to Filing Sufficient to Allow the Required Facts To Be Plead.

The obligations of plaintiffs seeking to prove difficult substantive claims arise before the complaint is filed. As amended in 1983, Rule 11 states in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law* or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(emphasis added). The Advisory Committee's notes to the amended Rule 11 state that the "new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." Under the Rule, a plaintiff cannot properly file a complaint until he or she has conducted a reasonable inquiry which leads to the conclusion that each element of the claim is "well grounded in fact."

Plaintiffs must satisfy both the pleading and investigation requirements imposed by the Federal Rules of Civil Procedure for the particular claims alleged in their complaint. Failure to meet those requirements can result in dismissal of the complaint under Rule 12(b)(6). See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("[i]n order to state a cognizable [§ 1983] claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs"); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (plaintiff's § 1983

complaint failed to state a claim where "he failed to allege that [his asserted constitutional] deprivation was caused by any constitutionally forbidden rule or procedure"). Failure to meet these requirements can also result in the imposition of sanctions under Rule 11. See *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 111 S. Ct. 922, 928 (1991) ("[A] party who signs a pleading or other paper without first conducting a reasonable inquiry shall be sanctioned.").

### B. Complaints Against Municipalities Under § 1983 Must Be Predicated On More Than A Theory Of *Respondeat Superior*.

The adequacy of petitioners' complaint in this case depends on the law governing § 1983 claims against municipalities. Because municipal defendants are immune from all *respondeat superior* liability, § 1983 complaints that allege facts amounting to nothing more than a *respondeat superior* theory cannot survive a motion to dismiss under Rule 12(b)(6).

#### 1. Municipalities Are Absolutely Immune From *Respondeat Superior* Liability.

For over a century, municipalities continued to enjoy the immunity from § 1983 cases that they had from suits at common law. See *Monroe v. Pape*, 365 U.S. 167 (1961). Then, in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court explained that Congress intended that a municipality could be sued under § 1983, but it "did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. The Court concluded that "a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words,

a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.*<sup>14</sup>

Under *Monell* a plaintiff must satisfy four requirements in order to prove a § 1983 claim against a municipality. As in any § 1983 case, the plaintiff must prove (1) a deprivation by a person of a federal right and (2) that the person acted under color of law. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The plaintiff must also show (3) that the deprivation was caused (4) by a municipal policy or custom. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989). By establishing these two additional requirements specifically for § 1983 actions against municipalities, *Monell* ensured that, "it is [only] when execution of a government's policy or custom . . . inflicts the injury that the government is [held] responsible under § 1983." 436 U.S. at 694.

*City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), elaborated on *Monell*'s policy requirements in a "failure to train" case similar to the claim at issue here. *Tuttle* involved a shooting by a police officer in the course of investigating a robbery. The trial court had given a jury instruction that allowed the jury to conclude from a single incident of police misconduct that the municipality had failed to train its officers adequately, that its failure to do so amounted to deliberate indifference to the plaintiff's constitutional rights, and that the municipality should be held liable under § 1983. *Id.* at 813. In holding that the trial court's instruction was flawed, the plurality explained that more than a single incident was necessary to find a municipality's policy in violation of § 1983:

---

<sup>14</sup> Since *Monell*, this Court has "repeatedly reaffirmed" the immunity of municipalities from *respondeat* liability. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988). Most recently, the Court unanimously did so in *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1067-68 (1992).

where the policy relied upon is not itself unconstitutional, *considerably more proof than the single incident* will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

*Id.* at 824 (emphasis added). The concurring opinion agreed that a single incident of police misconduct is insufficient to establish a *Monell* claim. *Id.* at 831 (Brennan, J., concurring).

In *City of Canton v. Harris*, 489 U.S. 378, this Court specified the limited circumstances in which a municipality's failure to train its officers can amount to a municipal "policy" within the meaning of *Monell*. The Court concluded that:

*Monell*'s rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible.

*Id.* at 389.

The Court held that a municipality's allegedly inadequate training program "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the policy comes into contact." *Id.* at 388. The Court further stated that a plaintiff can establish a municipality's deliberate indifference in one of two ways: (1) when the municipality fails to train its officers properly to address an obvious, recurrent situation involving the serious risk of unconstitutional harm; or (2) when police "so often violate constitutional rights that the need for further training must have been plainly obvious to city policy makers." *Id.* at 390 n.10.<sup>15</sup>

---

<sup>15</sup> See also *id.* at 397-98 (O'Connor, J., concurring) (further elaborating on these alternate methods of proof).

*City of Canton* reiterated that a plaintiff must show that "the deficiency in training actually caused" the constitutional deprivation. *Id.* at 391; see also *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1067-68 (1992).

These stringent requirements reflect the enhanced importance of municipal defendants' *respondeat* immunity in "failure to train" cases. Any standard of fault less stringent than "deliberate indifference" would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs," an exercise which "the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism." *City of Canton*, 489 U.S. at 392. As Justice O'Connor's concurring opinion explained, requiring a "very close causal connection" between the failure to train and a constitutional violation avoids imposing additional "'prophylactic' duties on municipal governments only remotely connected to underlying constitutional requirements themselves." 489 U.S. at 395 (O'Connor, J., concurring).

Potential failure-to-train liability also poses a serious threat to the municipal treasury:

As the authors of the Ku Klux Klan Act themselves realized, the resources of local government are not inexhaustible. The grave step of shifting of those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident. If § 1983 and the Constitution require the city of Canton to provide detailed medical and psychological training to its police officers, or to station paramedics at its jails, other city services will necessarily suffer, including those with far more direct implications for the protection of constitutional rights.

*Id.* at 400 (O'Connor, J., concurring); cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (expressing concern

about "possible strain on local treasuries and therefore on services available to the public at large").

## 2. Municipal Defendants' Immunity From *Respondeat Superior* Liability Is Meaningless If They Are Required to Defend Suits Based on That Theory.

As this Court has made clear, immunity from liability necessarily includes immunity from suit. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court announced an objective test for determining a government official's immunity from suit in order to ensure that "insubstantial claims [would] not proceed to trial." *Id.* at 816. Before *Harlow*, plaintiffs could create a factual issue on a government official's entitlement to immunity simply by alleging that the official had committed a wrong with "malice." See *Wood v. Strickland*, 420 U.S. 308, 313-14 (1975). By announcing a purely objective test in *Harlow*, under which government officials could enjoy qualified immunity as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," 457 U.S. at 817, this Court ensured that "many insubstantial claims" could be resolved on summary judgment. *Id.* The *Harlow* standard allowed the lower courts to effectuate this Court's admonition in *Butz v. Economou* that:

Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, . . . damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . [F]irm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.



438 U.S. 478, 508-09 (1978). *Harlow* mandates that discovery not be allowed against officials "[u]ntil [the] threshold immunity question is resolved." 457 U.S. at 817-19.

Since *Harlow*, this Court has continued to insist that government officials enjoy the full scope of their qualified immunity without having to proceed through discovery or to trial.<sup>16</sup> In *Anderson v. Creighton*, 483 U.S. 635 (1987), for example, the Court announced that, in order to obtain discovery in qualified immunity cases, a plaintiff would have to plead the violation of clearly established rights at an acceptable level of specificity. Absent a specificity requirement, the Court explained:

Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

*Id.* at 639.<sup>17</sup> See also *Siebert v. Gilley*, 111 S. Ct. at 1793

---

<sup>16</sup> See, e.g., *Davis v. Scherer*, 468 U.S. 183, 195-96 (1984) (refusing to allow violations of state procedures and laws to abrogate qualified immunity, in part because such considerations would make early disposition more difficult); *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (making an interlocutory appeal available for defendants whose qualified immunity defenses are denied); *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) (declining to engraft any *per se* exceptions upon *Harlow*'s general rule); *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991) (reiterating that qualified immunity issues must be decided well before trial).

<sup>17</sup> The Court explained that:

[O]n remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not,

("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

In both theory and practice, qualified immunity from liability encompasses immunity from suit. If the immunity were less broad, "[i]nsubstantial lawsuits [could] undermine the effectiveness of government." *Harlow*, 457 U.S. at 819 n.35. Likewise, a municipal defendant's immunity from *respondeat superior* liability must include immunity from suit. A municipal government with limited resources is no more deserving of being "harassed by frivolous lawsuits" than its employees. *Cf. Butz*, 438 U.S. at 508. Extensive discovery is at least as "disruptive of effective government" when served on the local government itself as when discovery is directed to its officers. *Cf. Harlow*, 457 U.S. at 817. "[I]nsubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure," whether the defendant is a natural or municipal "person" under § 1983. *Cf. id.* at 819 n.35. Faced with an inadequately pled complaint, a municipality should neither be forced "to engage in the expensive and time consuming preparation to defend the suit on its merits," nor subjected to the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siebert*, 111 S. Ct. at 1793.

---

and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

*Id.* at 646 n.6.

**C. The Fifth Circuit's Pleading Requirement Properly Applies The Requirements of Rule 8 and Rule 11 of The Federal Rules of Civil Procedure to § 1983 Claims Against Municipalities.**

A plaintiff in a § 1983 action who cannot allege the existence of a municipal policy that caused a violation of his or her constitutional rights must at least allege facts from which a "policy" of "deliberate indifference" causing the constitutional violation can be inferred; he must show "[c]onsiderably more than [a] single incident" of the allegedly wrongful conduct by municipal employees. See *Tuttle*, 471 U.S. at 824; *id.* at 831 (Brennan, J., concurring). Recognizing this, the Fifth Circuit requires that § 1983 plaintiffs allege "a pattern of similar incidents" involving municipal employees. *Leatherman*, 954 F.2d at 1058 (citations omitted) (Cert. Pet. App. 12a-13a); see also, e.g., *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992); *Palmer v. City of San Antonio*, 810 F.2d at 516. The Seventh Circuit has noted that a lesser demand would require a "leap in logic" that courts should be "unwilling to take." *Caldwell v. City of Elwood*, 959 F.2d 670, 673 (7th Cir. 1992).<sup>18</sup>

Petitioners complain that the Fifth Circuit's pleading requirement in "failure to train" cases is too high. In fact, the requirement mirrors the standards set out by the Court in *City of Canton* and its progeny. Before bringing a *City of Canton* claim,

<sup>18</sup> *Brower v. County of Inyo*, 489 U.S. 593 (1989), upon which petitioners rely heavily (see Pet. Br. at 20-21), is inapposite. The issue in that case was whether the plaintiffs had properly pleaded a "seizure" within the meaning of the Fourth Amendment. Moreover, the conclusory allegations to which petitioners refer (see Pet. Br. at 20) were pled in support of the plaintiffs' substantive due process claim in the lower courts, not their Fourth Amendment claim, see *Brower v. County of Inyo*, 817 F.2d 540, 544 (9th Cir. 1987). This Court did not pass on the adequacy of those allegations.

an attorney must gather enough evidence to certify, as well grounded in fact, an allegation that a "policy" of "deliberate indifference" caused the constitutional violation. Evidence of a single incident does not satisfy this Rule 11 burden. See, e.g., *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d at 202 (where a § 1983 complaint against police department, among other things, failed to "alleg[e] a single fact that would indicate problems 'systemic in nature,'" Rule 11 sanctions were appropriate); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1380 (4th Cir. 1991) (where plaintiffs had evidence only of "a single instance of alleged unconstitutional activity," sanctions were appropriate); *Gutierrez v. City of Hialeah*, 729 F. Supp. 1329, 1333 (S.D. Fla. 1990) (awarding sanctions where affidavit "consist[ed] entirely of conclusory allegations that Defendants instituted policy and custom permitting officers to use excessive force in the apprehension of suspects"). The Fifth Circuit's requirement, therefore, does not impose on plaintiffs any burden that they do not already have to bear under Rule 11 and the requirements of *City of Canton*.<sup>19</sup>

The Fifth Circuit's pleading requirement and Rule 11 do not impose a burden that "is impossible to meet." Pet. Br. at 24.<sup>20</sup>

<sup>19</sup>Moreover, the Fifth Circuit is interested in substance, not technicalities; it "will not dismiss cases until [it is] convinced that the specific allegations of the . . . complaint constitute plaintiffs' best case for" stating a claim against a government official or municipality. *Morrison v. City of Baton Rouge*, 761 F.2d 242, 246 (5th Cir. 1985); see also, e.g., *Rodriguez v. Avita*, 871 F.2d 552, 555 (5th Cir.), cert. denied, 493 U.S. 854 (1989).

<sup>20</sup>It is noteworthy that, before they filed their opposition to respondents' motion for summary judgment in the district court, petitioners had "ample opportunity to engage in full discovery" but failed to seek any evidence supporting their allegations against the municipal defendants. See *Leatherman*, 755 F. Supp. at 729 (Cert. Pet. App. 34a). Moreover, as petitioners themselves admit (Pet. Br. at 19), Rule 27(a) of the

Petitioners do not state that they have made *any* attempt to investigate similar incidents by *any* means, even by so simple a method as checking local newspapers. Other plaintiffs with analogous substantive claims have done considerably more. *See, e.g., Strauss v. City of Chicago*, 760 F.2d 765, 768 (7th Cir. 1985) (plaintiff secured statistical summaries from the Office of Professional Standards regarding complaints filed with the police department); *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990) (plaintiff's attorney hired a private investigator to interview defendants in an effort to determine whether they were involved in a conspiracy); *Colburn v. Upper Darby Township*, 838 F.2d 663, 672 (3d Cir. 1988) (plaintiff alleged that "Stierheim was the third person to commit suicide while in police custody at the upper Darby Township police department jail"); *Olivieri v. Thompson*, 803 F.2d 1265, 1269 (2d Cir. 1986) (plaintiff's attorney was "familiar" with other cases against Suffolk County police officers).

A lesser pleading requirement would eviscerate the sovereign immunity from *respondeat superior* liability that municipalities have always enjoyed:

Plaintiffs could file claims whenever a police officer abused them, add *Monell* boilerplate allegations, and proceed to discovery in the hope of turning up some evidence to support the "claims" made.

*Strauss v. City of Chicago*, 760 F.2d at 768. This case is a classic example. Without any factual support, petitioners allege that the municipal defendants failed to train their officers adequately (*see, e.g., Amd. Cpl. ¶ 23, J.A. 37; City of Canton*, 489 U.S. at 390), that the need for additional or different training was "so obvious" (*see, e.g., Amd. Cpl. ¶ 23, J.A. 38; 489 U.S.*

---

Federal Rules gives courts discretion to allow limited pre-filing discovery under certain circumstances.

at 390), that the municipal defendants' failure to implement the additional or different training amounted to "deliberate indifference" (*see, e.g., Amd. Cpl. ¶ 23, J.A. 38; 489 U.S. at 390*), and was a "substantial factor or cause" of the constitutional violations (*see, e.g., Amd. Cpl. ¶ 23, J.A. 38; 489 U.S. at 391*). Allowing this case to proceed to discovery would render meaningless the municipal defendants' immunity from *respondeat superior*.

The Fifth Circuit's pleading requirement properly applies this Court's teaching that immunity from liability must encompass immunity from suit. In qualified immunity cases, the Fifth Circuit requires that "plaintiffs . . . demonstrate prior to discovery that their allegations are sufficiently fact-specific to remove the cloak of protection afforded by an immunity defense." *Geier v. Fortenberry*, 849 F.2d 1550, 1553 (5th Cir. 1988); *see also Siegert v. Gilley*, 111 S. Ct. at 1795 (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific nonconclusory factual allegations which establish malice or face dismissal."). Allowing mere conclusory pleadings, the court has recognized, lays "the groundwork . . . for disruption of the official's duties, and frustration of the protections and policies underlying the immunity doctrine." *Elliott v. Perez*, 751 F.2d at 1472.

For even more compelling reasons, the Fifth Circuit requires that plaintiffs' allegations against municipal defendants be based on more than a *respondeat superior* theory. As in the qualified immunity context, more conclusory pleadings would threaten to disrupt municipal functions and thereby frustrate the protections and policies underlying municipal defendants' immunity from *respondeat superior*. Unlike the qualified immunity cases, in which plaintiffs must plead around an affirmative defense, *see Gomez v. Toledo*, 446 U.S. at 640, the Fifth Circuit requires that plaintiffs bringing claims against municipalities plead facts supporting their affirmative case; that is, the standard requires only that plaintiffs plead facts showing that they may be able to



meet their affirmative burden of proving more than *respondeat superior* liability.

Applying Rule 8 and Rule 11, the Fifth Circuit correctly affirmed the dismissal of petitioners' § 1983 claim against the municipal defendants. The Court of Appeals noted that petitioners failed to allege any "facts that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible." *Leatherman*, 954 F.2d at 1055 (Cert. Pet. App. 2a). Petitioners' pre-suit investigation pursuant to Rule 11 (if one was done) obviously revealed the existence of neither a municipal policy of failing properly to train police officers nor a second incident of the activity about which petitioners complain from which a policy of "deliberate indifference" could be inferred.<sup>21</sup> Petitioners stated no claim upon which relief could be granted. Dismissal was not only proper but required.<sup>22</sup>

<sup>21</sup> The Andert and Leatherman incidents are not sufficiently related to meet the Fifth Circuit's pattern requirement. The Leatherman petitioners complain primarily that TCNICU officers were inadequately trained in how properly to confront family dogs, an alleged training deficiency that has nothing to do with the search of the Andert residence. To the extent that both sets of petitioners allege that TCNICU failed to train its officers on the constitutional limitations restricting the manner in which search warrants may be executed, their allegations fall far short of the pleading specificity required by *Anderson v. Creighton*, 483 U.S. at 639.

<sup>22</sup> Even if petitioners' complaint, which does not contain any facts supporting its allegation of municipal liability, satisfies Rule 12(b)(6)'s standards, petitioners' summary judgment materials clearly did not satisfy Rule 56's standard. In Section 1983 actions involving the defense of qualified immunity, this Court has already encouraged courts to grant summary judgment against plaintiffs without allowing them to resort to discovery. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. at 818-19; *Anderson v. Creighton*, 483 U.S. at 641. Because municipalities' immunity from *respondeat superior* liability is as critical to Section

## II. A REQUIREMENT THAT, IN ORDER TO SURVIVE A RULE 12(b)(6) MOTION, A § 1983 COMPLAINT AGAINST A MUNICIPALITY MUST ALLEGE FACTS FROM WHICH A COURT CAN INFER MUNICIPAL LIABILITY DOES NOT VIOLATE THE RULES ENABLING ACT.

The Fifth Circuit's decision to affirm the dismissal of the amended complaint also comports with the Rules Enabling Act. That Act empowers this Court to "prescribe general rules of practice and procedure and rules of evidence in the United States district courts . . . and courts of appeals." 28 U.S.C. § 2072(a) (1988). These rules of procedure are invalid, however, if they "abridge, enlarge or modify any substantive right." *Id.* § 2072(b) (1988). The Fifth Circuit's pleading requirement complies with these provisions because it regulates "practice and procedure" and has only an incidental effect on plaintiffs' § 1983 rights. Petitioners' contention that the requirement unlawfully affects their substantive rights is wholly without merit.

This Court has explained that rules fall within the scope of the Rules Enabling Act if they govern the "practice and procedure" of the federal courts:

"The test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

*Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). Because the Fifth

1983's policies as defendant officials' qualified immunity defenses, see *supra* p. 21, this Court's precedent dictates that a plaintiff's failure to produce any facts in support of his claim of municipal liability should not survive a Rule 56 motion even if it does survive a motion under Rule 12.

Circuit's pleading requirement only governs how Section 1983 claims against municipalities must be brought, rather than the substantive elements those claims must satisfy, it clearly constitutes a rule of practice and procedure within the meaning of the Rules Enabling Act.

Rules of practice and procedure nonetheless can violate the Rules Enabling Act if they "abridge, enlarge, or modify" a substantive right. All procedural rules have some effect on substantive rights. However,

[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.

*Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 5 (1987); see also *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445 (1946). As long as the Rule "affects only the process of enforcing litigants' rights and not the rights themselves," *Burlington Northern*, 480 U.S. at 8, it does not violate the Rules Enabling Act's substantive rights proviso.

This Court recently confirmed that Rule 11 is fully consistent with the Rules Enabling Act. In *Cooter & Gell v. Hartmarx Corp.*, this Court explained that:

It is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts.

496 U.S. 384, 393 (1990). In *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, the Court further held that: "There is little doubt that Rule 11 is reasonably necessary to maintain the

integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental." 111 S. Ct. at 934.

The Fifth Circuit's application of Rule 8 to § 1983 claims against municipalities has no more effect on plaintiffs' substantive rights than does Rule 11. The court requires only that plaintiffs plead some of the facts that they presumably learn during their Rule 11 pre-filing inquiry. See *supra* p. 22-23. The requirement's "central purpose" is, of course, to "streamline the administration and procedure of the federal courts" by denying relief to plaintiffs with factually groundless filings. *Cooter & Gell*, 496 U.S. at 393; see *Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir.), *cert. denied*, 493 U.S. 854 (1989).

Nor does the pleading requirement "enlarge" a substantive right by extending a qualified immunity defense to municipalities. Rather, the requirement ensures that claims against municipalities are not based solely on a *respondeat superior* theory — a theory upon, which even the petitioners admit (Pet. Br. 24), municipal liability cannot lie. The Fifth Circuit's pleading requirement does not in theory, or effect, give municipalities a qualified immunity from suit; once a plaintiff pleads some facts from which municipal liability can be inferred, the plaintiff's case against a municipal defendant can proceed. Thus, under this Court's precedents, the Fifth Circuit's application of Rule 8, like Rule 11, fully complies with the dictates of the Rules Enabling Act.

### III. THE CLAIMS ARISING OUT OF THE ANDERT SEARCH ARE COLLATERALLY ESTOPPED.

Although the Fifth Circuit did not decide the issue, the Andert petitioners' claim must fail for another reason; they are estopped from bringing any of their challenges in this Court. In their statement of facts, the petitioners fail to mention that the same

seven persons who are the "Andert petitioners" in this Court<sup>23</sup> sued two police officers, Greg Bewley, who allegedly assaulted Mr. Andert, and Larry Traweek, who supervised the search of the Andert residence, in *Andert v. Bewley* for "the same police activity with which the court dealt as to these persons in *Leatherman*." (Grapevine Cert. Opp. App. 1).

A jury trial was held on the same allegations at issue here. At the conclusion of petitioners' evidence, the trial court granted Officer Traweek a directed verdict and also sustained his claim of qualified immunity. *Id.* (Grapevine Cert. Opp. App. 6). The case against Officer Bewley went to the jury. In answer to special interrogatories, the jury found that petitioners failed to prove that the officer had used force that was excessive under the circumstances. The jury (and court) also sustained Bewley's qualified immunity defense. *Id.* (Grapevine Cert. Opp. App. 7). Petitioners have not appealed from *Andert v. Bewley*.

Except for the fact that the case against the officers was separately tried, this case is precisely equivalent to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). As in *Heller*, the jury found that the officers did not engage in a constitutional violation and thus, as in *Heller*, petitioners' claims are barred. Accordingly, even if it is assumed that the local governments did fail to train the officers adequately, it is "quite beside the point," given the findings in *Andert*. *See id.* at 799.

The difference in procedural postures between this case and *Heller* is inconsequential. In *Allen v. McCurry*, 449 U.S. 90 (1980), this court explained that, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first

<sup>23</sup> Compare Petitioners' Brief at p. 4 with the Memorandum Opinion and Order in *Andert v. Bewley* (Grapevine Cert. Opp. App. 1).

case." *Id.* at 94.<sup>24</sup> Clearly, then, the fact that the finding was made in a separate case does not change the result of *Heller*. The Lealos/Andert claims are therefore barred and need not be considered.

<sup>24</sup> In *Allen*, the other court was a state court. However, under *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) these principles apply with at least equal force to a federal judgment.



## CONCLUSION

Because petitioners' amended complaint fails to state a claim upon which relief can be granted, respondents respectfully request that this Court affirm the Fifth Circuit's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992), in all relevant respects.

Respectfully submitted,

*Of Counsel*

DIXON W. HOLMAN  
CHIEF, CIVIL DIVISION  
VAN THOMPSON, JR.  
ASSISTANT DISTRICT  
ATTORNEY,  
TARRANT COUNTY,  
TEXAS  
Justice Center  
401 West Balknap  
Fort Worth, Texas 76196  
(817) 884-1400

BRETT A. RINGLE  
(Counsel of Record)  
ERIC J.F. REDWINE  
JONES, DAY, REAVIS  
& POGUE  
2300 Tramell Crow Center  
2001 Ross Avenue  
Dallas, Texas 75201  
(214) 220-3939

LAURIE F. CALDER  
JONES, DAY, REAVIS  
& POGUE  
1450 G Street, N.W.  
Washington, D.C. 20005  
(202) 879-3627

*Counsel for Respondents Tarrant  
County Narcotics Intelligence and  
Coordination Unit, Tarrant County,  
Texas, Don Carpenter, and Tim  
Curry*

October 5, 1992

NOV 4 1992

OFFICE OF THE CLERK

15  
NO. 91-1657

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1992

---

Charlene LEATHERMAN, et al.,  
Petitioners  
V.

TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION  
UNIT, et al.,  
Respondents

---

On Writ Of Certiorari To  
The United States Court of Appeals  
For The Fifth Circuit

---

PETITIONERS' REPLY BRIEF

---

DON GLADDEN  
P. O. Box 50686  
Fort Worth, TX 76105  
817-531-3667  
Counsel of Record

RICHARD GLADDEN  
420 S. Carroll, Suite E  
Denton, TX 76201  
817-387-7833

NOVEMBER 4, 1992

**BEST AVAILABLE COPY**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
PETITIONER'S REPLY ARGUMENT .....	1
I Respondents Raise Questions Not Presented for Review But Which Would, in any Event, Require Reversal of the Judgment Below .....	1
II Having Virtually Conceded that the Heightened Pleading Requirement as Applied is not Authorized by Rule 9(b), Respondents Cannot Logically Argue That a Heightened Pleading Requirement is Imposed, or Permitted, by Rule 8 .....	3
III In the Absence of an Available Absolute or Qualified Immunity, as Determined By Reference to Federal Law, and not State Common Law Immunities, Respondents Cannot Rely on an Immunity From Suit to Justify the Heightened Pleading Requirement .....	6



IV	In Light of the Pragmatic and Theoretical Difficulties With Application of the Heightened Pleading Requirement, Protecting Litigants From Vexatious or Abusive Litigation is Best Effected by Judicial Use of Available Rules to Control or Limit Discovery .....	9
V.	The Question Presented for Review is Neither Moot nor Subject to Collateral Estoppel .....	13

## TABLE OF AUTHORITIES

Cases:	Page
<u>Conley v. Gibson</u> , 355 U.S. 41 (1957).....	5
<u>Lujan v. Defenders of Wildlife</u> , ___ U.S. ___, 112 S.Ct. 2130 (1992) .....	3
<u>Lujan v. National Wildlife Federation</u> , 497 U.S. 871 (1990) .....	3
<u>Owen v. City of Independence, Mo.</u> , 445 U.S. 622 (1980) .....	6
<b>Statutes, Codes and Constitutional Provisions:</b>	
28 U.S.C. Section 2072 .....	2
42 U.S.C. Section 1983 .....	passim
Rule 1, F. R. Civ. P. ....	11
Rule 8, F. R. Civ. P. ....	3, 4, 5, 11, 13
Rule 9(b), F. R. Civ. P. ....	3, 4, 5, 8, 12
Rule 11, F. R. Civ. P. ....	9
Rule 12, F. R. Civ. P. ....	8
Rule 16, F. R. Civ. P. ....	13

NO. 91-1657

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1992**

---

Charlene **LEATHERMAN**, et al.,  
Petitioners

V.

**TARRANT COUNTY NARCOTICS  
INTELLIGENCE AND COORDINATION  
UNIT, et al.,**  
Respondents

---

**On Writ Of Certiorari To  
The United States Court of Appeals  
For The Fifth Circuit**

---

**PETITIONERS' REPLY BRIEF**

---

I.

RESPONDENTS RAISE QUESTIONS NOT  
PRESENTED FOR REVIEW BUT WHICH  
WOULD, IN ANY EVENT, REQUIRE  
REVERSAL OF THE JUDGMENT BELOW

Most of the respondents' briefs concern two questions which are not at issue. First, would it be desirable to have a Rule of Civil Procedure that requires heightened pleading in Section 1983 cases against municipalities? Petitioners believe that the answer is no, but even if the answer were yes, there is procedure for making changes in the Rules that is prescribed in 28 U.S.C. Sec. 2072 and that has not been followed here.

Second, respondents discuss at length what Petitioners will have to prove in order to prevail at trial, but that, too, is irrelevant to the questions presented. Petitioners agree, and they have pled accordingly, that they must show more than that unconstitutional acts were committed by officers or employees of the respondent municipalities. They acknowledge that they must show that the harm resulting to them was caused by a policy or practice of the respondents. Assuming, without deciding, that the two incidents alleged in the complaint could not satisfy this requirement, that fact is

irrelevant at this time since the case is simply at the pleadings stage. As this Court has recently underscored in two decisions dealing with the issue of standing, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992), and Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990), there is a substantial difference between a complaint that will satisfy the Rules, and the facts that need to be shown to avoid summary judgment or to have it granted in plaintiff's favor.

## II.

HAVING VIRTUALLY CONCEDED THAT THE HEIGHTENED PLEADING REQUIREMENT AS APPLIED IS NOT AUTHORIZED BY RULE 9(b), RESPONDENTS CANNOT LOGICALLY ARGUE THAT A HEIGHTENED PLEADING REQUIREMENT IS IMPOSED, OR PERMITTED, BY RULE 8.

The question actually presented is whether the Court of Appeals erred in requiring heightened pleadings for civil rights complaints against municipalities. Petitioners' argument in their



opening brief was quite simple: nothing in Rule 8 requires heightened pleading; the drafters of the Rules specified the circumstances under which heightened pleading was required in Rule 9(b); all parties agree that this case does not fall within Rule 9(b); and hence there is no requirement that the complaint be pled with any more specificity than ordinary federal court cases.

What is most surprising about the more than 100 pages of briefs filed by respondents, and the 64 pages filed by their amici is that the only discussion of Rule 9(b) is in a single paragraph on page 19 of the brief of the respondent Grapevine. After observing that securities fraud plaintiffs are sometimes required to plead detailed facts, the brief suggests that, "[t]o some extent this approach can be explained by the special pleading requirements of Rule 9(b) Fed. R. Civ. P. which requires that in fraud cases 'circumstances constituting fraud . . . shall be stated with particularity.'" That is the sum and substance of the discussion of Rule 9(b) in any

of the opposing briefs. There is not even an attempted explanation of why the drafters of the Rules imposed a specific pleading requirement in Rule 9(b) for fraud and certain other cases, but intended the same requirement sub silentio in Rule 8 to an undescribed class of civil rights complaints against municipal defendants and perhaps others.

But the lesson of Rule 9(b) is clear; when the Court wishes to impose heightened pleadings, it does so in clear and unmistakable language as it did in Rule 9(b). Otherwise, all complaints are subject to the general notice pleading requirements under Rule 8(b) which means only, as this Court observed in Conley v. Gibson, 355 U.S. 41, 47 (1957), that the defendants receive "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Petitioners satisfied that burden here, and hence it was error to dismiss their complaint.

### III.

IN THE ABSENCE OF AN AVAILABLE ABSOLUTE OR QUALIFIED IMMUNITY, AS DETERMINED BY REFERENCE TO FEDERAL LAW, AND NOT STATE COMMON LAW IMMUNITIES, RESPONDENTS CANNOT RELY ON AN IMMUNITY FROM SUIT TO JUSTIFY THE HEIGHTENED PLEADING REQUIREMENT.

Respondents recognize that under Owen v. City of Independence, 445 U.S. 621 (1980), they have no immunity -- absolute or qualified -- but nonetheless seek to rely on judge-created special pleading rules in qualified immunity cases. This argument is misplaced for at least two reasons.

First, Petitioners are suing under Section 1983, and the common law immunity for municipalities is irrelevant, as established by Owen, 445 U.S. at 647-48. Respondents cannot bring in by the back door a requirement premised on an immunity which this Court has barred by the front door of Owen. Second, the respondents confuse what Petitioners must prove in order to prevail at trial (or to defeat

summary judgment), with what they must plead to avoid dismissal. Petitioners here specifically pled the necessary elements of their Section 1983 claim against the municipalities.

Respondent Grapevine argues in its brief at page 14 that, if the courts allow Petitioners to go forward without facts to prove their claim, "municipalities would be hauled into court in many instances when, under the substantive law of Sec. 1983, these cases would eventually be thrown out because the plaintiffs could not meet their burden of proof. This situation wastes both the taxpayer's money and scarce judicial resources." According to respondent, a heightened pleading standard ensures that "only truly meritorious Sec. 1983 claims go forward and that these meritorious claims are given the attention they rightfully deserve." Id.

Of course, Grapevine's conclusion that some cases would be eventually dismissed is correct, but the same is true of countless other cases filed in the federal courts under our system of notice pleading.

But the decision to allow such cases to proceed to discovery is plainly the judgment made by this Court and the drafters of the Rules, which have been in effect for more than 50 years. They concluded that it is preferable, as a matter of policy, to allow cases to be filed in federal courts without proof to support the claims, and even without very specific allegations, in order to assure that plaintiffs have an opportunity to prove their claim after discovery, except in those few cases where there is a Rule specially providing for heightened pleading, such as that set forth in Rule 9(b). While Grapevine wishes that only "truly meritorious Sec. 1983 claims" should be allowed to survive a motion under Rule 12(b)(6) -- without telling the Court who will decide which claims are meritorious and how -- its argument that heightened pleading is the way to eliminate unmeritorious claims is simply not justified by the Federal Rules of Civil Procedure or their underlying philosophy. And if there are claims that

should not have been brought into federal court, the proper remedy is through Rule 11, which provides for sanctions against attorneys who do not have reasonable basis in law and fact for complaints they file.

#### IV.

IN LIGHT OF THE PRAGMATIC AND THEORETICAL DIFFICULTIES WITH APPLICATION OF THE HEIGHTENED PLEADING REQUIREMENT, PROTECTING LITIGANTS FROM VEXATIOUS OR ABUSIVE LITIGATION IS BEST EFFECTED BY JUDICIAL USE OF AVAILABLE RULES TO CONTROL OR LIMIT DISCOVERY.

In their opening brief, Petitioners explained that the heightened pleading rule in cases against municipalities made it particularly difficult for plaintiffs to survive a motion to dismiss because the specific facts needed to prove their cases (such as this case, which involves inadequate training and/or improper supervision) are simply not available without formal discovery, unlike the wrongful acts of individuals for which there is ordinarily



substantial pre-filing evidence, direct and/or circumstantial. In their briefs, respondents suggest that additional information was available under Texas law and that, in any event, Petitioners had an opportunity to take discovery in this case, which they did not do, and so they are in no position to complain. Neither contention is sufficient to justify a heightened pleading requirement.<sup>1</sup>

As far as Texas law is concerned, Petitioners strongly disagree that the evidence they needed would be available before suit, both because of exemptions under the law, and because Petitioners would need to take depositions and the Texas open record law applies only to documents. But more fundamentally, the heightened pleading

---

<sup>1</sup>The near impossibility of meeting this requirement without discovery can be seen by looking at the detailed nature of the proof that respondent Lake Worth in its brief says must be pled in cases like this (at 21-22) and asking how any plaintiff can even meet that burden without taking discovery.

requirement cannot depend on the vagaries of Texas law, because Rule 8 applies to all cases, and not just those filed in Texas. To make the applicability of heightened pleading depend on the availability of a state law permitting pre-suit discovery would undermine the goals and scope of Rule 1, which makes the Federal Rules applicable "to all suits" and provides that "they shall be construed to secure the just, speedy, and inexpensive determination of every action."

The fact that Petitioners might have, but did not take additional discovery here is also irrelevant. It is, of course, not part of the question on which review was granted, any more than is the respondents' other claim that, in any event, summary judgment against Petitioners was proper. Moreover, if the complaint was defective as filed, then respondents were entitled to immediately move to dismiss and deny Petitioners all opportunity to take discovery, just as they could if

the complaint were based on an allegation of fraud and Rule 9(b) had not been satisfied.

The fundamental problem raised by the lack of discovery, coupled with the heightened pleading requirement, was recognized and directly confronted in the briefs filed by two of respondents' amici, the State of Texas, joined by 13 other states, and the National Institute of Municipal Law officers, and its six co-amici. Both briefs recognize the force of the concurring opinion of Judge Goldberg below where he raised this problem, and both propose a solution which is precisely the one Petitioners embraced. In these types of cases, plaintiffs should be allowed limited discovery on the policy/pattern issue, and if they cannot meet their burdens, then summary judgment should be granted for the defendants. See Texas Br. at 14, n. 8, and National Institute Br. at 27, n. 18. Whether it is necessary to require a plaintiff who has obtained the requisite facts in discovery to replead his complaint, or whether there are other means better

suited to the task of specifically informing defendants of the facts on which the claim is based, is an issue of no great moment since, unlike the ruling of the Fifth Circuit, the plaintiff in such a case would be able to satisfy any reasonable requirement, once he had taken discovery on the issue. Stated another way, the answer to the legitimate interests of municipalities in avoiding unnecessary litigation is not to impose a heightened pleading requirement under Rule 8, but the judicious use of Rule 16 to control discovery, by isolating potentially dispositive issues for early discovery and possible summary judgment.

V.

#### THE QUESTION PRESENTED FOR REVIEW IS NEITHER MOOT NOR SUBJECT TO COLLATERAL ESTOPPEL

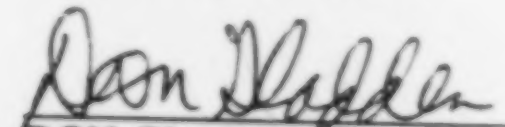
Finally, respondents Grapevine and Tarrant County urge the Court to affirm as to the Andert Petitioners because of an adverse ruling against them in a suit the Andert Petitioners brought.

against the individual officers involved in their incident. Like the other claims of respondent, that, too, is misplaced. Although couched in several places in terms of mootness, which is an issue the Court can always reach, it is plain that Petitioners' claim for money damages is not moot because no one has paid them the money that they have demanded. The only arguable claim that respondents have is one of collateral estoppel, but even that is not properly before this Court, both because it is not part of the question presented, and because, in any event, the decision relied on is not final, but on appeal (No. 92 - 1467, 5th Cir., Notice of Appeal filed May 19, 1992). The pendency of that appeal was noted in Petitioners' Reply Brief in Support of Certiorari dated May 22, 1992, but omitted from respondents' briefs on the merits.

\*\*\*  
CONCLUSION

In short, the heightened pleading requirement is an invention of the Fifth Circuit and other courts which finds no basis in the Federal Rules. To the extent that it is needed to respond to a problem, it is a problem that is non-existent, is an inevitable result of notice pleading, and/or can be handled adequately by other provisions of the Federal Rules. Accordingly, the decision of the Court of Appeals should be reversed, and the case remanded to the trial court for further proceedings.

Respectfully submitted,



DON GLADDEN

P.O. Box 50686

Fort Worth, Texas 76105

817-531-3667

Counsel of Record

&

RICHARD GLADDEN

420 South Carroll, Suite E

Denton, Texas 76201

817-387-7833

ATTORNEYS FOR  
PETITIONERS



SEP 18 1992

OFFICE OF THE CLERK

8

NO. 91-1657

---

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1992

---

CHARLENE LEATHERMAN, ET AL.,

*Petitioners,*

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, ET AL.,

*Respondents,*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

---

CITY OF COLLEGE STATION, TEXAS' AMICUS BRIEF

---

CATHERINE LOCKE  
City Attorney  
City of College Station  
1101 Texas Avenue  
College Station, Texas 77842  
(409) 764-3507  
Fax No. (409) 764-3571

**BEST AVAILABLE COPY**

## QUESTIONS PRESENTED

1. May a complaint against a local government entity brought under 42 U.S.C. section 1983 be dismissed for failure to plead specific factual allegations supporting governmental liability?

(a) Whether dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure of an action brought pursuant to 42 U.S.C. section 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. section 2072(b)?

(b) Whether a complaint will withstand a motion to dismiss brought pursuant to Rule 12(b)(6), even though it contains only conclusory allegations that track the requirements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?

## LIST OF PARTIES

### PETITIONERS

Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman; Gerald Andert; Kevin Lealos and Jerri Lealos, individually and as next friend of Travor Lealos and Shane Lealos, Pat Lealos, and Donald Andert.

### RESPONDENTS

The Tarrant County Narcotics Intelligence and Coordination Unit; Tarrant County, Texas; Tim Curry, in his official capacity, and Don Carpenter, in his official capacity; City of Lake Worth; and City of Grapevine, Texas.

## TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF AUTHORITIES .....	iv, v
JURISDICTIONAL STATEMENT .....	1
STATUTES AND RULES INVOLVED .....	2
STATEMENT OF THE CASE .....	3
ARGUMENT .....	5
CONCLUSION .....	10



## TABLE OF AUTHORITIES

CASES	PAGE
<i>Anderson v. Creighton</i> , 483 U.S. 636, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) .....	8
<i>Arnold v. Board of Education</i> , 880 F.2d 305 (11th Cir. 1989) .....	7
<i>Celotex Corp. V. Catrett</i> , 447 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) .....	9
<i>City of Canton v. Harris</i> , 489 U.S. 378, 109 S.Ct. 1197 (1989) .....	8, 9
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) .....	6
<i>Collinson v. Gott</i> , 895 F.2d 994 (4th Cir. 1990) .....	7
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) .....	7
<i>Hall v. Pennsylvania State Police</i> , 570 F.2d 86 (3rd Cir. 1978) .....	7
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1987) .....	8
<i>McKee v. City of Rockwall, Texas</i> , 877 F.2d 409 (5th Cir. 1989) .....	9

## TABLE OF AUTHORITIES - Continued

CASES:	PAGE
<i>Mitchell v. Forsyth</i> , 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) .....	8, 9
<i>Monell v. New York City Department of Social Services</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ...	6, 8
<i>Nuclear Transport &amp; Storage, Inc. v. United States</i> , 890 F.2d 1348 (6th Cir. 1989) .....	7
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) .....	6, 8
<i>Ostrer v. Aronwald</i> , 567 F.2d 551 (2d Cir. 1977) .....	7
<i>Palmer v. City of San Antonio</i> , 810 F.2d 514 (5th Cir. 1987) .....	7, 9
<i>Rodriguez v. Avita</i> , 871 F.2d 552 (5th Cir. 1989) .....	7
<i>Siegert v. Gilley</i> , 895 F.2d 797, (D.C. Cir. 1990) affirmed, 111 S.Ct. 1789 (1991) .....	7

---

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1992

---

CHARLENE LEATHERMAN, ET AL.,

*Petitioners,*

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, ET AL.,

*Respondents,*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

---

CITY OF COLLEGE STATION, TEXAS' AMICUS BRIEF

---

CATHERINE LOCKE  
City Attorney  
City of College Station  
1101 Texas Avenue  
College Station, Texas 77842  
(409) 764-3507  
Fax No. (409) 764-3571

**STATUTES AND RULES INVOLVED**

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) **Claims for Relief.**

A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . .

(b) **Pleading to be Concise and Direct: Consistency.**

Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(c) **Construction of Pleadings.**

All pleadings shall be so construed as to do substantial justice.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law, and that it is not interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Rules Enabling Act, Title 28, United States Code, Section 2072 provides:

- (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
- (b) Such rules shall not abridge, enlarge or modify any substantive right.

### STATEMENT OF THE CASE

Petitioners Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman ("Leatherman plaintiffs") filed suit alleging that Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"), Tarrant County, Texas ("Tarrant County") and the City of Lake Worth, Texas ("Lake Worth") violated their constitutional rights in connection with Respondents' search of their residence. The

allegations against these three Respondents stem from the shooting of Petitioners' dogs during the search.

TCNICU filed a motion to dismiss the original complaint pursuant to Rule 12(b)(6). The District Court dismissed the complaint for failure to state a claim. The District Court later vacated the dismissal, providing the Leatherman plaintiffs with additional time to amend to cure the inadequacies. The basis of the rescinded dismissal was that the Leatherman plaintiffs had failed to allege any facts to support the existence of a policy or custom which would overcome the defendant governmental entities' absolute immunity and subject them to liability. In its opinion, the District Court specifically directed the plaintiffs' attention to the Fifth Circuit's heightened pleading requirement for 42 U.S.C. 1983 cases.

Taking advantage of the opportunity to replead, the Leatherman plaintiffs did try to allege a custom and policy when they added Gerald Andert, Kevin Andert, Kevin Lealos and Jerri Lealos, individually and as next friends of Tavor and Shane Lealos, Pat Lealos and Donald Andert (collectively the "Andert plaintiffs"), and new defendants, Tim Curry and Don Carpenter, in their official capacities as Director of TCNICU and the Sheriff



of Tarrant County, and the City of Grapevine ("Grapevine").

TCNICU, Curry, Carpenter and Grapevine subsequently moved to dismiss pursuant to Rule 12(b)(6). The District Court granted the motion and dismissed the amended complaint pursuant to the rule. At the time the District Court also ruled that summary judgment under Rule 56 was also proper. The Court found no evidence of the existence of a governmental policy or custom which supported the decision. Petitioners' argument against summary judgment was the inability to pursue discovery. Respondents and the District Court pointed out that this discovery was not made.

The decision was appealed to the Court of Appeals for the Fifth Circuit. In affirming the judgment, the Court of Appeals, relying upon the heightened pleading requirement, determined that the Petitioners' complaint was inadequate in that it failed to state any specific facts to support its claim of inadequate training.

### ARGUMENT

The bottom line of the requirement of particularity in pleadings is that it protects governmental entities against respondent superior liability under 42 U.S.C. 1983 sought to be imposed by

plaintiffs who cannot hope to prove that a custom or policy gave rise to the constitutional violation. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Supreme Court has clearly articulated that it will not impose municipal liability for the constitutional violation of a nonpolicymaking officer without more than the allegation of that violation. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Attempts to impute causation have been rejected by the Supreme Court. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

Nevertheless, proper analysis requires us to separate two different issues when a 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.

*Collins v. City of Harker Heights, Texas*, \_\_\_ U.S. \_\_\_, \_\_\_, 112 S.Ct. 1061, 1063 (1992).

The Supreme Court should affirm the adoption of the heightened pleading requirement by the Court of Appeals for the Fifth Circuit and other circuits. Although the term may not be used, most of the other circuits have a particularized pleading

requirement. *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986); *Siegert v. Gilley*, 895 F.2d 797, (D.C. Cir. 1990) *affirmed*, 111 S.Ct. 1789 (1991); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989); *Ostrer v. Aronwald*, 567 F.2d 551 (2nd Cir. 1977); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978); *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989).

The heightened pleading requirement imposed by the Fifth Circuit provides protection to local officials and governments from vexatious and expensive lawsuits based upon form book pleadings. *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985); *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). The heightened pleading requirement does not conflict with the Rule 8 notice pleading, but rather it conforms to the reasonable inquiry into the facts requirement of Rule 11.

Cases such as *Elliott*, where the immunity to suit of governmental officials is at stake, present a special and acute subset of the general run. In view of the enormous expense involved today in litigation, however, of the heavy cost of responding to even baseless legal action, and of Rule 11's new language requiring into the facts of the case by an attorney *before* he brings an action, applying the stated rule to all 1983 actions as much to recommend it.

*Rodriquez v. Avita*, 871 F.2d 552, 554 (5th Cir. 1989).

This pleading requirement is actually a requirement that pleadings not be conclusory. *Harlow v. Fitzgerald*, 457 U.S. 800 (1987); *Anderson v. Creighton*, 483 U.S. 636 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Petitioners have not shown that they have a claim that is more than conclusory. Petitioners' failure to train allegations, made pursuant to the Supreme Court's decision in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), are cursory in nature, made without evidence of an actual custom or policy.

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See *Oklahoma City v. Tuttle*, *supra*, at 823, 105 S.Ct. at 2436 (opinion of REHNQUIST, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities - a result we rejected in *Monell*, 436 U.S., at 693-694, 98 S.Ct. at 2037. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism. Cf. *Rizzo v. Goode*, 423 U.S. 362, 378-380, 96 S.Ct. 598, 607-608, 46 L.Ed.2d 561 (1976).

*City of Canton, Ohio v. Harris*, 489 U.S.378, 391-392, 109 S.Ct. 1197, 1206 (1989).

This failure of the Petitioners to allege any facts in support of the elements - specific training deficiency, nexus that represents policy and close relationship to the injury - particularly after amendment and opportunity to conduct discovery, is a sound basis for dismissal for failure to meet pleading requirements. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Although not immune, the municipality and therefore its taxpayers should not be subject to expensive litigation on the allegation of a single or even two incidents involving nonpolicymaking officials without the allegation of facts that show the elements of a cause of action. *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987).

Moreover, this failure to show evidence of the elements of failure to adequately train, policy and nexus to the injury is clearly a basis for the grant of summary judgment. *Celotex Corp. V. Catrett*, 447 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *McKee v. City of Rockwall, Texas*, 877 F.2d 409 (5th Cir. 1989).

## CONCLUSION

The decision of the Fifth Circuit Court of Appeals is unquestionably supported by the pleadings, evidence, and relevant law. Applicable legal principles of pleading and summary judgment with regard to municipal civil rights liability were followed and applied. For these reasons and those specifically discussed above, the Supreme Court should uphold the judgment of the lower court.

Respectfully submitted,

CITY OF COLLEGE STATION

CATHERINE LOCKE  
CITY ATTORNEY  
CITY OF COLLEGE STATION, TEXAS  
1101 TEXAS AVENUE  
COLLEGE STATION, TEXAS 77842  
(409) 764-3507  
STATE BAR NO. 12461400  
AMICUS CURIAE



11  
No. 91 - 1657

FILED

OCT 2 1992

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1992

CHARLENE LEATHERMAN, et al.,

PETITIONERS,

VS.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,

RESPONDENTS.

On Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE TEXAS MUNICIPAL  
LEAGUE  
AND THE TEXAS CITY ATTORNEYS ASSOCIATION  
IN SUPPORT OF RESPONDENTS

SUEAN M. HERTON  
CLERK OF RECORD  
GENERAL COUNSEL  
TEXAS MUNICIPAL LEAGUE  
211 EAST FIFTH STREET 1636  
AUSTIN, TEXAS 78701-5283  
(512) 475-4200

ATTORNEY FOR AMICUS CURIAE

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. May a complaint against a local government entity brought under 42 U.S.C. sec. 1983 be dismissed for failure to plead specific factual allegations supporting governmental liability?

a. Whether dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure of an action brought pursuant to 42 U.S.C. sec. 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. sec. 2072(b)?

b. Whether dismissal of a complaint is proper under Rule 12(b)(6), on the grounds that it contains only conclusory allegations that track the requirements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?

**TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE .....	2
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
CONCLUSION .....	10



## TABLE OF AUTHORITIES

CASES	Page
<u>Bartholomew v. Fischel</u> , 782 F.2d 1148 (3d Cir. 1986) .....	7
<u>Bennett v. City of Slidell</u> , 728 F.2d 762 (5th Cir. 1985), <i>cert. denied</i> , 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985) .....	4
<u>City of Canton, Ohio v. Harris</u> , 109 S.Ct. 1197 (1989) .....	4
<u>Elliot v. Perez</u> , 751 F.2d 1472 (5th Cir. 1985) .....	4,5
<u>Monell v. Department of Social Services of the City of New York</u> , 436 U.S. 658 (1978) .....	3,5,6,8
<u>Munz v. Parr</u> , 758 F.2d 1254 (8th Cir. 1985) .....	7
<u>Owen v. City of Independence</u> , 445 U.S. 621 (1980) .....	4
<u>Palmer v. City of San Antonio</u> , 810 F.2d 514 (5th Cir. 1987) .....	4
<u>Pembaur v. Cincinnati</u> , 475 U.S. 469 (1986) .....	4
<u>Revene v. Charles County Commissioners</u> , 882 F.2d 870 (4th Cir. 1989) .....	7

<u>Ricuitti v. New York City Transit Authority</u> , 941 F.2d 119 (2d Cir. 1991) .....	7
<u>Rodgers v. Lincoln Towing Service, Inc.</u> , 771 F.2d 194 (7th Cir. 1985) .....	7
<u>Rodriguez v. Avita</u> , 871 F.2d 552 (5th Cir. 1989) .....	5
<u>Santiago v. Fenton</u> , 891 F.2d 373 (1st Cir. 1989) .....	7
<u>Smith v. Ambrogio</u> , 456 F.Supp. 1130 (D. Conn. 1978) .....	7
<u>Strauss v. City of Chicago</u> , 760 F.2d 765 (7th Cir. 1985) .....	5,6,7

## STATUTES, CODES AND CONSTITUTIONAL PROVISIONS

Federal Rules of Civil Procedure, Rule 8 .....	8
28 U.S.C. Section 2072 .....	9
42 U.S.C. Section 1983 .....	3,4,5,9

No. 91 - 1657

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1992

CHARLENE LEATHERMAN, et al.,

PETITIONERS,

VS.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,

RESPONDENTS.

On Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE TEXAS MUNICIPAL  
LEAGUE  
AND THE TEXAS CITY ATTORNEYS ASSOCIATION  
IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICI CURIAE

The Texas Municipal League is a nonprofit association of over 960 Texas municipalities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas municipalities. Amici curiae have a vital interest in this case because the decision of this Honorable Court has the potential for altering the heightened pleading requirement necessary to subject municipalities and other governmental entities to Section 1983 causes of action.

Amici Curiae respectfully submit this brief in support of the Respondents.

Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief amicus curiae. The parties' written consent documents have been filed with the Clerk of the Court.

## SUMMARY OF THE ARGUMENT

The decision of the Fifth Circuit Court of Appeals to affirm the district court's dismissal of the Petitioners' complaint in this cause of action should be upheld. The Petitioners' complaint failed to base their allegations of the existence of an unconstitutional policy upon any facts or evidence. Such a failure does not satisfy the Fifth Circuit's heightened pleading requirements in Section 1983 actions.

The district court's dismissal of Petitioners' complaint is consistent with Rule 8 of the Federal Rules of Civil Procedure. The Petitioners simply failed to show that they were entitled to relief in this cause of action because they did not disclose any facts upon which to base their claim that an unconstitutional policy caused their alleged injuries.

Applying a heightened pleading requirement to Section 1983 actions does not violate the Rules Enabling Act because such a requirement merely imposes a procedural requirement that must be satisfied before the plaintiffs are allowed to subject the defendants to full-blown litigation.

## ARGUMENT

A municipality may only be liable under Section 1983 "where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). Additionally, a municipality cannot be held liable under a theory of *respondeat superior*. Monell, at 691. "A local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." Monell, at 694, 98 S.Ct. at 2037. A single act may



be sufficient to impose liability on the part of the municipality only if the decision to adopt a particular course of action is made by that government's authorized policy makers. Pembaur v. Cincinnati, 475 U.S. 469 (1986). Inadequate police training can serve as the basis for liability only where the failure to train amounts to deliberate indifference by city policymakers to the constitutional rights of persons contacted by police officers. City of Canton, Ohio v. Harris, 109 S.Ct. 1197 (1989).

The plaintiffs in the case at hand have pled the elements of a Section 1983 inadequate training cause of action. However, the plaintiffs failed to plead the existence of any facts or evidence that support the conclusory allegations contained in the plaintiffs' complaint. For sound reasons, the Fifth Circuit has consistently held that a Section 1983 cause of action must be pled on specific facts and not merely conclusory allegations. Palmer v. San Antonio, 810 F.2d 514 (5th Cir. 1987); Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985). Such a requirement applies to actions against governmental entities as well as actions against public officials. Palmer v. San Antonio, 810 F.2d at 516. "... [T]he assertion of a single incident is not sufficient to show that a policy or custom exists on the part of a municipality." Palmer, 810 F.2d at 516-517, citing Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed. 2d 612 (1985). Without a showing of the existence of an unconstitutional policy of a municipality, a municipality, as a sovereign entity, is immune from suit as well as liability. See Owen v. City of Independence, 445 U.S. 621 (1980). In

discussing the reasons for extending the heightened pleading requirement to causes of action against public entity defendants, the Fifth Circuit stated that:

in view of the enormous expense involved today in litigation, ... the heavy cost of responding to even a baseless legal action, and of Rule 11's new language requiring reasonable inquiry into the facts of the case by an attorney *before* he brings an action, applying the stated rule to all section 1983 actions has much to recommend it.

Rodriguez v. Avita, 871 F.2d 552, 554 (5th Cir. 1989), *cert. denied*, 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d 114 (1989). Discussions of other courts regarding the heightened pleading requirements in actions against public officials are also instructive. As the court stated in Elliot v. Perez, "... allowing broadly worded complaints, such as those of the plaintiffs here, which leaves to traditional pretrial depositions, interrogatories, and requests for admission the development of the real facts underlying the claim, effectively eviscerates important functions and protections of official immunity." Elliot v. Perez, 751 F.2d at 1476.

Other courts have also articulated persuasive reasons for upholding the special pleading requirements in Section 1983 cases. The Seventh Circuit, for example, imposes a special pleading requirement in Section 1983 cases brought under Monell. In Strauss v. City of Chicago, the Court of Appeals for the Seventh Circuit held:

A complaint that tracks Monell's requirement of official policy with bare allegations cannot stand when the policy identified is nothing more than acquiescence in prior misconduct. The absence of any facts at all to support plaintiff's claim renders the allegations mere legal conclusions of Section 1983 liability devoid of any well-pleaded facts ... To allow otherwise would be tantamount to allowing suit to be filed on a *respondeat superior* basis. Plaintiffs could file claims whenever a police officer abused them, add Monell boilerplate allegations, and proceed to discovery in the hope of turning up some evidence to support the "claims" made.

Strauss v. City of Chicago, 760 F.2d 765, 767-768 (7th Cir. 1985).

The Seventh Circuit, therefore, held that to state a claim under Monell a complaint must specify at least some evidence that proved the existence of a policy that led to the injuries complained of by the plaintiff:

The existence of a policy that caused a plaintiff's injury is an essential part of Section 1983 liability, so that some fact indicating the existence of some such policy must be pled. Without some evidence ... regardless how slight, that a policy caused plaintiff's injury,

the plaintiff simply cannot proceed in court against the municipality.

Strauss, 760 F.2d at 768.

Other circuit courts, as well as the Fifth and Seventh Circuits, have required more than conclusory allegations of a municipal practice or policy, and more than pleadings that do little more than parrot the language of Monell. See e.g., Santiago v. Fenton, 891 F.2d 373 (1st Cir. 1989); Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991); Bartholomew v. Fischel, 782 F.2d 1148 (3d Cir. 1986); Revene v. Charles County Commissioners, 882 F.2d 870 (4th Cir. 1989); Munz v. Parr, 758 F.2d 1254 (8th Cir. 1985). The plaintiff must allege facts that support the existence of a policy or custom. "Boilerplate allegations of a municipal policy, entirely lacking in any factual support that a city policy does exist, are insufficient." Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 202 (7th Cir. 1985). A bare allegation of a municipal policy or custom may generate far-reaching discovery, and "neither a federal court nor a municipality should be burdened with such an action unless a detailed pleading is presented." Smith v. Ambrogio, 456 F.Supp. 1130, 1137 (D.Conn. 1978). The plaintiffs' complaint in the case under consideration failed to sufficiently establish the existence of an unconstitutional municipal policy, therefore the complaint was properly dismissed under Federal Rule of Civil Procedure 12(b).

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain ...

(2) a short and plain statement of the claim showing that the pleader is entitled to relief, ...

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(f) Construction of Pleadings.

All pleadings shall be so construed as to do substantial justice.

The Fifth Circuit's dismissal is consistent with Federal Rule of Civil Procedure 8. Rule 8 requires a plaintiff to make a statement of the claim showing that the complainant is entitled to relief. The plaintiffs failed to show that they were entitled to relief in this cause of action in that they omitted any specific facts or evidence required to show the existence of a municipal policy that caused their alleged injuries. Such a failure does not, as Rule 8 requires, put the defendants on notice of the claim asserted by the plaintiffs. Conclusory allegations parroting the language of Monell have properly and consistently been held to fail to state a claim under Rule 8.

The Rules Enabling Act, Title 28, United States Code, Section 2072, provides in pertinent part:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right.

Applying a special pleadings requirement to Section 1983 actions does not "abridge" any substantive right of the plaintiffs. The heightened pleadings requirement merely imposes a procedural element that must be satisfied before the plaintiffs are allowed to subject the defendants to burdens of full-blown litigation.

Dismissal of Section 1983 claims that fail to state a claim with particularity under Rule 12(b)(6) is not only consistent with Rule 8 and the Rules Enabling Act, but significant public policy reasons demand such a practice by the federal courts. Non-meritorious claims must be dismissed to conserve the scarce judicial resources for those claims that are meritorious. Additionally, the fiscal resources of our governmental entities, ultimately financed by the public at large, must be conserved by minimizing defense costs attributable to non-meritorious claims. Allowing the dismissal of complaints that fail to state a claim is the method that properly advances these public policy goals.



CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

SUSAN M. HORTON  
COUNSEL OF RECORD  
GENERAL COUNSEL  
TEXAS MUNICIPAL LEAGUE  
211 EAST 7TH, SUITE 1020  
AUSTIN, TEXAS 78701-3283  
(512) 478-6601

ATTORNEY FOR AMICI CURIAE

OCT 5 1992

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

CHARLENE LEATHERMAN, *et al.*,  
Petitioners,

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND  
COORDINATION UNIT, *et al.*,  
Respondents.

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

BRIEF OF THE NATIONAL INSTITUTE OF  
MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE  
OF CITIES, INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION,  
COUNCIL OF STATE GOVERNMENTS,  
NATIONAL GOVERNORS' ASSOCIATION,  
U.S. CONFERENCE OF MAYORS, AND  
NATIONAL ASSOCIATION OF COUNTIES  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD RUDA \*

Chief Counsel

JAMES I. CROWLEY

STATE AND LOCAL LEGAL CENTER

444 North Capitol Street, N.W.

Suite 845

Washington, D.C. 20001

(202) 434-4850

\* *Counsel of Record for the  
Amici Curiae*

### QUESTION PRESENTED

Whether a federal district court can require "heightened pleading" when a complaint asserting a section 1983 claim against a municipality alleges a custom or policy of inadequate training under *City of Canton v. Harris*, 489 U.S. 378 (1989).



## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF THE <i>AMICI CURIAE</i> .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	8
THE HEIGHTENED PLEADING STANDARD IS NECESSARY TO VINDICATE A MUNICI- PALITY'S IMMUNITY FROM SUIT UNDER SECTION 1983 FOR AN INJURY INFLICTED SOLELY BY ITS EMPLOYEES .....	8
A. A Local Governmental Entity Is Immune From Suit Under Section 1983 Unless Its Policy Or Custom Has Caused A Constitutional Violation..	8
B. The Substantial Costs Which Attend Insubstan- tial Section 1983 Claims Against Local Govern- mental Entities Require Recognition That <i>Monell's</i> Rule States An Immunity From Suit..	18
C. The Heightened Pleading Standard Is Necessary To Protect A Local Governmental Entity From The Loss Of Its Immunity From Suit And Vio- lates Neither Rule 8 Nor The Rules Enabling Act .....	22
CONCLUSION .....	28

## TABLE OF AUTHORITIES

CASES	Page
<i>Abney v. United States</i> , 431 U.S. 651 (1977)	10, 26
<i>Arnold v. Board of Educ. of Escambia County, Ala.</i> , 880 F.2d 305 (11th Cir. 1989)	5
<i>Barbour v. City of Ellsworth</i> , 67 Me. 294 (1876)	13
<i>Bartholomew v. Fischl</i> , 782 F.2d 1148 (3d Cir. 1986)	5
<i>Blake v. City of Pontiac</i> , 49 Ill. App. 543 (1893)	12
<i>Branch v. Tunnell</i> , 937 F.2d 1382 (9th Cir. 1991)	5
<i>Brown v. Frey</i> , 889 F.2d 159 (8th Cir. 1989)	5
<i>Brown v. Vinahaven</i> , 65 Me. 402 (1876)	12-13
<i>Brown's Adm'r v. Town of Guyandotte</i> , 12 S.E. 707 (W. Va. 1890)	14
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	23
<i>Caldwell v. City of Elwood</i> , 959 F.2d 670 (7th Cir. 1992)	5
<i>Calwell v. City of Boone</i> , 51 Iowa 687 (1879)	12
<i>Campbell's Adm'r v. City Council</i> , 53 Ala. 527 (1875)	11
<i>Chapman v. City of Detroit</i> , 808 F.2d 459 (6th Cir. 1986)	5
<i>City of Canton v. Harris</i> , 489 U.S. 378 (1989)	3, 17, 20, 21
<i>City of Chicago v. Turner</i> , 80 Ill. 419 (1875)	12
<i>City of Corsicana v. White</i> , 57 Tex. 382 (1882)	14
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	20
<i>Collins v. City of Harker Heights</i> , 112 S.Ct. 1061 (1992)	21
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	23
<i>Craig v. City of Charleston</i> , 180 Ill. 154 (1899)	15
<i>Crawford-El v. Britton</i> , 951 F.2d 1314 (D.C. Cir. 1991)	5
<i>Darpan v. Mayor of Mobile</i> , 31 Ala. 469 (1858)	11
<i>Dewey v. University of New Hampshire</i> , 694 F.2d 1 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983)	5
<i>Dombrowski v. Eastland</i> , 387 U.S. 82 (1967)	10
<i>Easterly v. Town of Irwin</i> , 99 Iowa 694 (1896)	12
<i>Edgerly v. Concord</i> , 59 N.H. 341 (1879)	13
<i>Elliott v. City of Philadelphia</i> , 75 Pa. 347 (1874)	14

## TABLE OF AUTHORITIES—Continued

	Page
<i>Elliot v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985)	4, 5
<i>Fox v. The Northern Liberties</i> , 3 Watts & Serg. (Pa.) 103 (1841)	11
<i>Gill v. Mooney</i> , 824 F.2d 192 (2d Cir. 1987)	5
<i>Gillmor v. Salt Lake City</i> , 32 Utah 180 (1907)	15
<i>Gooden v. Howard County, Md.</i> , 954 F.2d 960 (4th Cir. 1992) (en banc)	5
<i>Grumbine v. Mayor</i> , 2 McArthur (D.C.) 578 (1876)	11
<i>Guaranty Trust Co. v. York</i> , 326 U.S. 99 (1945)	25
<i>Hafford v. City of New Bedford</i> , 82 Mass. (16 Gray) 297 (1860)	13
<i>Ham v. Mayor of New York</i> , 70 N.Y. 459 (1877)	13-14
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965)	25
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	passim
<i>Harris v. City of Atlanta</i> , 62 Ga. 290 (1879)	11-12
<i>Hayes v. City of Oshkosh</i> , 33 Wis. 314 (1873)	14
<i>Heller v. Mayor of Sedalia</i> , 53 Mo. 159 (1873)	13
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	6, 10, 17
<i>Johnson v. United States</i> , 333 U.S. 10 (1948)	4
<i>Jolly's Adm'r v. City of Hawesville</i> , 89 Ky. 279 (1889)	12
<i>Karim-Panahi v. Los Angeles Police Dept.</i> , 839 F.2d 621 (9th Cir. 1988)	5
<i>Kelley v. Cook</i> , 21 R.I. 29 (1898)	14
<i>Lynch v. City of North Yakima</i> , 37 Wash. 657 (1905)	15
<i>Lynde v. City of Rockland</i> , 66 Me. 309 (1876)	13
<i>Martin v. Mayor of Brooklyn</i> , 1 Hill 545 (N.Y. Sup. Ct. 1841)	13
<i>Marmilian v. Mayor of New York</i> , 62 N.Y. 160 (1875)	13
<i>McElroy v. City Council of Albany</i> , 65 Ga. 387 (1880)	12
<i>McFadin v. City of San Antonio</i> , 22 Tex. Civ. App. 140 (1899)	14
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	passim
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978)	passim

## TABLE OF AUTHORITIES—Continued:

	Page
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	8, 9
<i>Murtaugh v. City of St. Louis</i> , 44 Mo. 479 (1869)	13
<i>Nicholson v. City of Detroit</i> , 129 Mich. 246 (1902)	15
<i>Ogg v. City of Lansing</i> , 35 Iowa 495 (1872)	12
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980)	<i>passim</i>
<i>Palmer v. City of San Antonio</i> , 810 F.2d 514 (5th Cir. 1987)	4, 5
<i>Parks v. City Council of Greenville</i> , 21 S.E. 540 (S.C. 1895)	14
<i>Patsy v. Board of Regents</i> , 457 U.S. 496 (1982)	21
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469 (1986)	19
<i>Peters v. City of Lindsborg</i> , 40 Kan. 654 (1889)	12
<i>Prather v. City of Lexington</i> , 52 Ky. (13 B. Mon.) 559 (1852)	11, 16
<i>Pray v. Mayor of Jersey City</i> , 32 N.J.L. 394 (1868)	13
<i>Ragan v. Merchants Transfer &amp; Warehouse Co., Inc.</i> , 337 U.S. 530 (1949)	25
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976)	21
<i>Royce v. Salt Lake City</i> , 15 Utah 401 (1897)	14
<i>Sawyer v. County of Creek</i> , 908 F.2d 663 (10th Cir. 1990)	5
<i>Sherbourne v. Yuba County</i> , 21 Cal. 113 (1862)	11
<i>Sutton &amp; Dudley v. Board of Police</i> , 41 Miss. 236 (1866)	13
<i>Taylor v. City of Owensboro</i> , 98 Ky. 271 (1895)	12
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951)	10
<i>Town of Laurel v. Blue</i> , 1 Ind. App. 128 (1891)	12
<i>United States v. Ogden</i> , 572 F.2d 501 (5th Cir. 1978)	4
<i>United States v. Rivera</i> , 595 F.2d 1095 (5th Cir. 1978)	4
<i>Van Cauwenberghe v. Biard</i> , 486 U.S. 517 (1988)	9
<i>Western College v. City of Cleveland</i> , 12 Ohio St. 375 (1861)	14
<i>Wilcox v. City of Chicago</i> , 107 Ill. 334 (1883)	12

## TABLE OF AUTHORITIES—Continued

STATUTES AND RULES	Page
28 U.S.C. § 2072 (b)	7, 23, 24
42 U.S.C. § 1983	<i>passim</i>
Fed. R. Civ. P. 8(a)	7, 23
Fed. R. Civ. P. 11	26
Fed. R. Civ. P. 12(b) (6)	3, 4
Tex. Rev. Civ. Stat. Ann. Art. 6552-17a (Vernon Supp. 1992)	27
OTHER AUTHORITIES	
Paul M. Bator, et al., <i>Hart and Wechsler's The Federal Courts and the Federal System</i> (3d ed. 1988)	21
Black's Law Dictionary (6th ed. 1990)	25
Andrew Blum, <i>Lawsuits Put Strain on City Budgets</i> , National Law Journal, May 16, 1988	20, 21, 22
Congressional Globe, 42d Cong., 1st Sess. (1871)	16, 17
Theodore Eisenberg & Stewart Schwab, <i>The Reality of Constitutional Tort Litigation</i> , 72 Cornell L. Rev. 641 (1987)	21-22
Fed. R. Civ. P. 11 Advisory Committee Note	26
Note, <i>Liability of Cities for the Negligence and Other Misconduct of Their Officers and Agents</i> , 30 Am. St. Rep. 376 (1893)	15
Martin A. Schwartz & John E. Kirklin, <i>Section 1983 Litigation: Claims, Defenses, and Fees</i> (ed. 1986)	21
Thomas G. Shearman & Amasa A. Redfield, <i>A Treatise on the Law of Negligence</i> (1869)	15
Tex. Att'y Gen. Open Records Decision No. 329 (1982)	27
Tex. Att'y Gen. Open Records Decision No. 350 (1982)	27
Tex. Att'y Gen. Open Records Decision No. 397 (1983)	27
Edward E. White, <i>Negligence of Municipal Corporations</i> (1920)	15



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

---

No. 91-1657 —

---

CHARLENE LEATHERMAN, *et al.*,  
*Petitioners,*

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND  
COORDINATION UNIT, *et al.*,  
*Respondents.*

---

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

---

**BRIEF OF THE NATIONAL INSTITUTE OF  
MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE  
OF CITIES, INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION,  
COUNCIL OF STATE GOVERNMENTS,  
NATIONAL GOVERNORS' ASSOCIATION,  
U.S. CONFERENCE OF MAYORS, AND  
NATIONAL ASSOCIATION OF COUNTIES  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

---

**INTEREST OF THE *AMICI CURIAE***

*Amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici* believe that the Court's decision in this case will have a substantial impact on the amenability of municipalities to litigation under 42 U.S.C. § 1983.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that Congress, in enacting section 1983, did not intend that municipalities be subject to suit under *respondat superior* theories of liability. The "heightened pleading" standard applied by the court below is essential to vindicate this immunity from suit. Invalidating the heightened pleading standard, by contrast, would allow every incident of alleged police misconduct to form the basis of a claim against the municipal employer based solely on a conclusory allegation of "failure to train." *Amici* submit that such a result is plainly contrary to the intent of Congress to preserve municipalities' immunity from suit for the torts of their employees.

Because the Court's decision will have a direct impact on this issue of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.<sup>1</sup>

#### STATEMENT OF THE CASE

This case arises out of two incidents of alleged police misconduct. One incident involved petitioners Donald and Gerald Andert, five members of the Lealos family, and law enforcement officers of respondents City of Grapevine, Texas, and the Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU). This incident allegedly occurred at 8 p.m. on January 30, 1989, at Gerald Andert's residence in Southlake, Texas, when police officers executed a search warrant. The other incident involved petitioners Charlene, Kenneth, and Travis Leatherman, and law enforcement officers of respondents City of Lake Worth, Texas, Tarrant County and TCNICU. This incident allegedly occurred on May 20, 1989, when police officers executed a search warrant at the Leatherman residence.

<sup>1</sup> The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to the Rule 37.3 of the Rules of this Court.

On November 22, 1989, the Leathermans sued Tarrant County and TCNICU in state court under 42 U.S.C. § 1983 alleging that the search of their residence violated, *inter alia*, the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. See J.A. 3-8. Defendants removed the suit to federal district court and moved to dismiss under Fed. R. Civ. P. 12(b)(6) or for summary judgment. J.A. 9-11. On February 1, 1990, the district court granted the motion. J.A. 19. On February 8, 1990, the Leathermans moved to vacate the dismissal. J.A. 21-24. On March 8, 1990, the district court granted the motion and permitted the filing of an amended complaint. J.A. 26-27.

In their amended complaint, the Leathermans added the Anderts and Lealoses as plaintiffs and added the January 30, 1989, incident at Gerald Andert's residence. J.A. at 28-52. The amended complaint also added the cities of Lake Worth and Grapevine as defendants.<sup>2</sup> *Id.* at 32. The amended complaint alleged that the two searches violated the Fourth and Fourteenth Amendments in various respects. See *Plaintiffs First Amended Complaint* ¶¶ 21-22, 29-30, 35, J.A. 36-37, 41-42, 46. The amended complaint recited language from *City of Canton v. Harris*, 489 U.S. 378, 390 (1989), and generally alleged that the local governmental defendants had each

failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of [d]efendant . . . , by and through its official policymaker . . . , demon-

<sup>2</sup> The amended complaint also named Tim Curry, District Attorney of Tarrant County and Director of TCNICU, and Don Carpenter, Sheriff of Tarrant County, as defendants. J.A. 31. Curry and Carpenter were sued in their official capacity only. *Id.* at 28.

strates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train.

See, e.g., *Plaintiff's First Amended Complaint*, ¶ 23, J.A. 37-38.<sup>3</sup>

Defendants TCNICU, Tarrant County, Carpenter and Curry moved to dismiss under Fed. R. Civ. P. 12(b)(6) or for summary judgment. J.A. 53-61. The City of Grapevine also moved to dismiss under Rule 12(b)(6). Pet. App. 26a. Applying the Fifth Circuit's "heightened pleading" standard,<sup>4</sup> the district court held with respect to petitioners' inadequate training claims that their amended complaint did not allege sufficient facts to establish the existence of a municipal policy or custom of inadequate training or deliberate indifference on the part of the municipal policymakers.<sup>5</sup> Pet. App. 39a-40a. The district court dismissed the complaint as to all defendants, including non-moving defendant Lake Worth.

<sup>3</sup> Petitioners also alleged that TCNICU had violated their fourth amendment rights by adopting a custom or policy of "caus[ing] the issuance and execution of search warrants predicated on no more than the detection of 'odors associated' with illegal drug manufacturing." See *id.* at ¶¶ 35-38, J.A. 46-48.

<sup>4</sup> See, e.g., *Palmer v. City of San Antonio*, 810 F.2d 514, 516-17 (5th Cir. 1987); *Elliot v. Perez*, 751 F.2d 1472, 1477-82 (5th Cir. 1985).

<sup>5</sup> With respect to petitioners' claim that TCNICU had adopted a policy of obtaining search warrants "predicated on no more than the odors associated with illegal drug manufacturing," the district court held that sufficient facts had not been pleaded to establish the existence of a custom and practice. Pet. App. 40a. The district court alternatively relied on *Johnson v. United States*, 333 U.S. 10 (1948), *United States v. Rivera*, 595 F.2d 1095 (5th Cir. 1979), and *United States v. Ogden*, 572 F.2d 501 (5th Cir. 1978), to hold that the presence of the odors associated with narcotics manufacturing established probable cause for a search warrant and thus negated any claim of a Fourth Amendment violation. Pet. App. 41a-43a.

The court of appeals affirmed. Relying on the "heightened pleading" standard it adopted in *Elliot and Palmer*,<sup>6</sup> the court held that the complaint "f[ell] short of alleging the requisite facts to establish a policy of inadequate training." Pet. App. 12a. In the court of appeals' view, petitioners were required to "demonstrate[] 'at least a pattern of similar incidents in which citizens were injured' . . . [in order] to establish the official policy requisite to municipal liability under section 1983." *Id.* at 12a-13a (citations omitted). Because the complaint also "fail[ed] to state any facts with respect to the adequacy (or inadequacy) of the police training," the court of appeals affirmed the dismissal of the complaint. *Id.* at 13a.

<sup>6</sup> See *supra* note 4. Every other court of appeals has likewise adopted some form of the "heightened pleading" standard in suits brought under section 1983. See *Dewey v. University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982), *cert. denied*, 461 U.S. 944 (1983); *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987); *Bartholomew v. Fischl*, 782 F.2d 1148, 1151-52 (3d Cir. 1986); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Caldwell v. City of Elwood*, 959 F.2d 670, 672 n.4 (7th Cir. 1992); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991); *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990); *Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 309-10 (11th Cir. 1989); *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991). The Ninth Circuit, however, has rejected the application of the "heightened pleading" standard in the municipal liability context. See *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) ("[A] claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'" (citation omitted)).



### SUMMARY OF ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), this Court held that Congress, in enacting section 1983, did not intend for suits to be brought against municipalities under *respondeat superior* theories of liability. The Court thus concluded "that a local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694 (emphasis added). *Monell's* rule embodies an "immunity from suit" which, as this Court has recognized, is "effectively lost if a case is erroneously permitted" to proceed to discovery and trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The heightened pleading standard applied by the court of appeals is thus necessary to vindicate this immunity from suit.

Supporting the conclusion that *Monell's* rule states an immunity from suit is the limited nature of section 1983's abrogation of municipal immunity. While section 1983 abrogated municipal immunity when the municipality had itself caused a constitutional violation, it did not abrogate those "immunities 'well grounded in history and reason,'" *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (citation omitted), that are compatible with its purpose. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). At the time of section 1983's enactment, municipalities were immune from suit for torts based on their governmental functions as well as torts based on the acts of their employees. There is no evidence that the Forty-Second Congress intended to alter the nature of the common law immunity from suit municipalities enjoyed for the torts of their employees.

In addition, many of the same societal costs which led this Court to conclude that an official's qualified immunity embodies an immunity from suit, *see Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), compel the recognition that municipalities retain an immunity from suit and not

just a defense to liability. These costs, which underscore the need for heightened pleading, include the costs of litigation, the diversion of official energy, and dampening of the ardor of public officials. Moreover, allowing insubstantial suits against municipalities to proceed to discovery and trial entails additional costs such as the *de facto* imposition of *respondeat superior* liability when municipalities are forced to settle insubstantial claims and the needless interjection of the federal courts into local matters.

Contrary to petitioners' assertion, the "heightened pleading" standard neither violates the concept of "notice pleading" embodied in Fed. R. Civ. P. 8(a) nor, where pre-complaint discovery is available, the Rules Enabling Act, 28 U.S.C. § 2072(b). The Federal Rules of Civil Procedure "[can]not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); the "notice pleading" of Rule 8 cannot abridge a local government's immunity from suit. Thus, where pre-complaint discovery is available, the "heightened pleading" standard does not abridge petitioner's substantive right under section 1983. Moreover, in these circumstances the "heightened pleading" standard is required by the Rules Enabling Act to prevent the "notice pleading" of Rule 8 from abridging a local government's immunity from suit.

## ARGUMENT

### THE HEIGHTENED PLEADING STANDARD IS NECESSARY TO VINDICATE A MUNICIPALITY'S IMMUNITY FROM SUIT UNDER SECTION 1983 FOR AN INJURY INFLICTED SOLELY BY ITS EMPLOYEES.

A core principle of section 1983 doctrine is that "a local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Dep't. of Soc. Servs.*, 436 U.S. at 694 (emphasis added). *Monell's* rule states an immunity from suit and not just a defense to liability. While in enacting section 1983 Congress abrogated municipal immunity where the municipality had itself caused a constitutional violation, section 1983 did not alter the common law immunity from suit which municipalities enjoyed for the torts of their officers and agents. The "heightened pleading" requirement applied by the court of appeals is necessary to ensure that a local governmental entity has not been sued merely because it employed a tortfeasor. This rule is essential to vindicate respondents' immunity from suit, which will be "effectively lost" if this case is erroneously allowed to proceed to discovery and trial. *Mitchell*, 472 U.S. at 526. The judgment of the court of appeals should therefore be affirmed.

#### A. A Local Governmental Entity Is Immune From Suit Under Section 1983 Unless Its Policy Or Custom Has Caused A Constitutional Violation.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court first addressed the issue of a municipality's immunity from suit under section 1983.<sup>7</sup> In *Monroe*, petitioners

<sup>7</sup> 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

"alleged [that] the City [was] liable for the acts of its police officers, by virtue of *respondeat superior*." *Monell*, 436 U.S. at 708-10 (Powell, J., concurring) (quoting *Brief for Petitioners* at 21, *Monroe* (O. T. 1960, No. 39)). This Court upheld the dismissal of the complaint with respect to the City, holding "that Congress did not undertake to bring municipal corporations within the ambit of § [1983]." *Monroe*, 365 U.S. at 187. As this Court subsequently noted, *Monroe* "completely immunize[d] municipalities from suit under § 1983." *Monell*, 436 U.S. at 695; see also *Owen*, 445 U.S. at 669 n.10 (Powell, J., dissenting).

Seventeen years later in *Monell*, this Court "overrule[d] *Monroe* . . . insofar as it h[eld] that local governments are wholly immune from suit under § 1983." 436 U.S. at 663. While *Monell* held that Congress, in enacting section 1983, had intended to create a cause of action against municipalities, it did so only when the municipality's custom or policy was the "moving force" behind a violation of constitutional rights, *i.e.*, when the municipality substantially caused the violation. 436 U.S. at 690-95. *Monell* expressly reaffirmed *Monroe's* rejection of the notion that a municipality could "be held liable *solely* because it employs a tortfeasor." *Id.* at 691. The Court thus concluded "that a local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694 (emphasis added).

The conclusion that *Monell's* rule states an immunity from suit—an entitlement to not be subjected "either to the costs of trial or to the burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 817-18—and not just a defense to liability, see *Mitchell*, 472 U.S. at 526,<sup>8</sup> is

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>8</sup> See also *Van Cauwenberghe v. Biard*, 486 U.S. 517, 523-27 (1988) (claim of immunity from civil process grounded in doctrine

supported by this Court's precedents construing the scope of immunities under section 1983. While this Court has not, subsequent to *Monell*, examined the question of the nature of the immunity municipalities retained after the enactment of section 1983, there can be little dispute that this immunity is an *immunity from suit*. As this Court has recognized, section 1983 did not abrogate those "immunities 'well grounded in history and reason.'" *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). As *Imbler* notes, "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." 424 U.S. at 418. Accordingly, this Court has construed section 1983 as incorporating those immunities "well established at common law at the time" of enactment whose "rationale is compatible with the purposes of" section 1983. *Owen*, 445 U.S. at 638.

At the time section 1983 was enacted, it was well settled that municipalities were immune from suit for torts committed in the exercise of their governmental functions, including the torts of their employees. This Court recognized as much in *Owen*, characterizing the "common law immunity for governmental functions [as] . . . more comparable to an *absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset*, than to a qualified immunity, which 'depends upon the circumstances and motivations of [the official's] actions, as es-

of specialty "should be characterized as the right not to be subject to a binding judgment" and thus denial of claim not an appealable collateral order); *Abney v. United States*, 431 U.S. 651, 660-61 (1977) (" . . . Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.") (emphasis in original); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam) ("doctrine of legislative immunity . . . protect[s] legislators] not only from consequences of litigation's results but also from the burden of defending themselves") (internal citations omitted).

tablished by evidence at trial.'" 445 U.S. at 647 n.29 (citation omitted; emphasis added). No category of cases more amply demonstrates the validity of *Owen's* recognition that, at common law, the municipal tort immunity for governmental functions embodied an immunity from suit, than those suits brought against municipalities for the torts committed by their employees—including police—in the exercise of governmental functions. The decisions of the courts of more than twenty States affirming the sustaining of demurrers or ordering non-suits in actions brought against municipalities on *respondeat superior* theories conclusively demonstrate that, at common law, municipalities were immune from suit for such claims. See, e.g., *Fox v. The Northern Liberties*, 3 Watts & Serg. (Pa.) 103 (1841) (affirming trial court's sustaining of demurrer to action against municipality alleging superintendent of police had illegally seized plaintiff's horse); *Prather v. City of Lexington*, 52 Ky. (13 B. Mon.) 559, 564 (1852) (affirming sustaining of demurrer to declaration that city was liable for negligence of mayor and officers in failing to prevent destruction of home by mob; "the present action can not be maintained against the city"); *Dargan v. Mayor of Mobile*, 31 Ala. 469, 478 (1858) (affirming trial court's sustaining of demurrer in suit brought against municipality alleging negligent police conduct); *Sherbourne v. Yuba County*, 21 Cal. 113 (1862) (affirming sustaining of demurrer to complaint alleging county liable for misfeasance of employees).<sup>9</sup>

<sup>9</sup> See also the following:

*Alabama. Campbell's Adm'r v. City Council*, 53 Ala. 527, 530-31 (1875) (affirming sustaining of demurrer on grounds municipality not liable for omission of police).

*District of Columbia. Grumbine v. Mayor*, 2 McArthur (D.C.) 578, 581-82 (1876) (affirming sustaining of demurrer to declaration alleging city liable when police officers unlawfully arrested plaintiff; "there is no foundation upon which this action can be maintained against the defendant").

*Georgia. Harris v. City of Atlanta*, 62 Ga. 290, 295 (1879) (affirming grant of non-suit to city when plaintiff alleged city and police



liable for false imprisonment); *McElroy v. City Council of Albany*, 65 Ga. 387, 388-89 (1880) (affirming sustaining of demurrer to declaration alleging city liable when city watchman committed assault and battery).

*Illinois. City of Chicago v. Turner*, 80 Ill. 419, 423 (1875) (reversing jury verdict finding city liable for acts of its servants in executing unlawful ordinance; "plaintiff's declaration disclose[d] no cause of action"); *Wilcox v. City of Chicago*, 107 Ill. 334, 340 (1883) (affirming sustaining of demurrer to declaration alleging city liable for negligence of employee in driving fire department wagon); *Blake v. City of Pontiac*, 49 Ill. App. 543, 554 (1893) (affirming sustaining of demurrer to declaration alleging city liable for unlawful arrest and inhumane jailhouse conditions).

*Indiana. Town of Laurel v. Blue*, 1 Ind. App. 128, 131 (1891) (reversing judgment and ordering trial court to sustain demurrer to complaint alleging city liable when town marshal falsely arrested plaintiff).

*Iowa. Ogg v. City of Lansing*, 35 Iowa 495, 498-99 (1872) (affirming sustaining of demurrer to petition alleging city liable when its employees, in seeking plaintiff's assistance in removing corpse, failed to advise of deadly disease; "[t]he consequences of the doctrine contended for by appellant would be startling and alarming"); *Calwell v. City of Boone*, 51 Iowa 687, 689 (1879) (affirming sustaining of demurrer to petition alleging city liable for police officer's unlawful assault and battery); *Easterly v. Town of Irwin*, 99 Iowa 694, 698 (1896) (affirming sustaining of demurrer to petition alleging city liable when police falsely arrested and imprisoned plaintiff).

*Kansas. Peters v. City of Lindsborg*, 40 Kan. 654, 656-57 (1889) (affirming sustaining of demurrer to petition alleging city liable when police officers falsely arrested plaintiff; "we believe the petition does not state a cause of action against the city").

*Kentucky. Jolly's Adm'r v. City of Haverhill*, 89 Ky. 279, 282 (1889) (affirming sustaining of demurrer to petition alleging city liable "for personal injury resulting from the malfeasance or negligence of police officers"); *Taylor v. City of Owensboro*, 98 Ky. 271, 278 (1895) (affirming sustaining of demurrer to petition alleging city liable for unlawful arrest, conviction and confinement; "the principle of *respondent superior* does not apply").

*Maine. Brown v. Vinalhaven*, 65 Me. 402, 404-05 (1876) (ordering non-suit in action alleging town liable for medical malpractice by doctor it employed; "the rule *respondent superior*" does not apply and "the action cannot be maintained upon the facts alleged

in the writ"); *Lynde v. City of Rockland*, 66 Me. 309, 315 (1876) (ordering non-suit where declaration alleged city liable for trespass when its board of health took possession of plaintiff's hotel for use as hospital during epidemic; "That no action against the city can be maintained upon such facts as are here alleged must be regarded as settled law in this state."); *Barbour v. City of Ellsworth*, 67 Me. 294, 295 (1876) (ordering non-suit to plaintiff's declaration that town liable when its officers quarantined plaintiff in hospital and failed to provide proper medical care).

*Massachusetts. Hafford v. City of New Bedford*, 82 Mass. (16 Gray) 297, 302 (1860) ("no action will lie against the city for [the] negligence or improper conduct [of members of fire department], while acting in discharge of their official duty").

*Mississippi. Sutton & Dudley v. Board of Police*, 41 Miss. 236, 239-40 (1866) (affirming judgment on pleadings for county; while "[p]rivate corporations are responsible for the tortious acts of their agents . . . generally this is not the case with municipal corporations").

*Missouri. Murtaugh v. City of St. Louis*, 44 Mo. 479, 481-82 (1869) (reversing judgment for plaintiff in suit against city to recover for injuries caused by negligence and misconduct of city hospital employees; "it [is] obvious that the action can not be maintained"); *Heller v. Mayor of Sedalia*, 53 Mo. 159, 160-61 (1873) (affirming sustaining of demurrer to petition alleging city liable for fire department's negligence in failing to extinguish fire; "[t]he doctrine of '*respondent superior*' does not apply").

*New Hampshire. Edgerly v. Concord*, 59 N.H. 341, 343 (1879) (dismissing complaint alleging city liable for improper use of fire hydrant hose by city's officers).

*New Jersey. Pray v. Mayor of Jersey City*, 32 N.J.L. 394, 398 (1868) (reversing verdict for plaintiff and ordering non-suit; "the neglects of agents of the public, in the discharge of their legitimate functions, cannot constitute the basis of an action in behalf of an individual who has sustained a particular damage").

*New York. Martin v. Mayor of Brooklyn*, 1 Hill 545, 551 (N.Y. Sup. Ct. 1841) (affirming sustaining of demurrer; "no case has been cited wherein . . . municipal corporations are liable for omissions of a duty specifically imposed by statute on one of their officers"); *Maximilian v. Mayor of New York*, 62 N.Y. 160, 170 (1875) (affirming sustaining of demurrer in action brought against city for death caused by driver of city ambulance and rejecting rule of *respondent superior*); *Ham v. Mayor of New York*, 70 N.Y. 459, 463-65 (1877) (setting aside jury verdict for plaintiff on claim that city was

liable for negligent acts of employees of city department of public instruction because "the rule of *respondent superior* could not well be applied" and "it [was] apparent that the plaintiff could not maintain the action").

*Ohio. Western College v. City of Cleveland*, 12 Ohio St. 375, 380 (1861) (affirming sustaining of demurrer to petition alleging city liable when its officers took control of plaintiff's building and failed to prevent its destruction in riot).

*Pennsylvania. Elliott v. City of Philadelphia*, 75 Pa. 347, 353-54 (1874) (affirming sustaining of demurrer to declaration alleging city liable when police falsely arrested plaintiff and failed to take proper custody of his horse).

*Rhode Island. Kelley v. Cook*, 21 R.I. 29, 31-33 (1898) (sustaining demurrer to declaration alleging city liable when police unlawfully arrested and confined and negligently failed to provide medical care to plaintiff's intestate).

*South Carolina. Parks v. City Council of Greenville*, 21 S.E. 540, 541 (S.C. 1895) (affirming non-suit on grounds that "a municipal corporation . . . is not liable to an action for damages sustained by the tort of any of its officers or agents, unless it is made so by some statute to that effect").

*Texas. City of Corsicana v. White*, 57 Tex. 382, 384 (1882) (petition alleging city liable when mayor and marshal unlawfully arrested, imprisoned and extorted money from plaintiff "was bad upon general demurrer. . . . If [mayor and marshal] did this without authority, then they have made themselves personally liable for trespass; but there is no cause of action against the city."); *McFadin v. City of San Antonio*, 22 Tex. Civ. App. 140, 141 (1899) (affirming sustaining of demurrer to petition alleging city liable for illegal arrest and conviction of plaintiff).

*Utah. Royce v. Salt Lake City*, 15 Utah 401, 410 (1897) (reversing judgment for plaintiff; trial "court erred in refusing to grant . . . nonsuit" where plaintiff alleged city was liable for his unlawful arrest and conviction).

*West Virginia. Brown's Adm'r v. Town of Guyandotte*, 12 S.E. 707, 708 (W. Va. 1890) (affirming sustaining of demurrer to declaration alleging municipality liable for negligence of jailer in death of inmate in jailhouse fire).

*Wisconsin. Hayes v. City of Oshkosh*, 33 Wis. 314, 318-19 (1873) (members of fire department act "as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city").

These numerous decisions amply demonstrate that, at common law, municipalities retained an immunity from suit for torts committed by their employees or agents.<sup>10</sup> The commentators also support this view. See, e.g., Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* §§ 139, 140 (1869) ("Police officers are held not to be public officers within the rule making the corporation answerable for their acts."; "A municipal corporation is not answerable for the illegal and wrongful acts of its officers, though done *colore officii*"); Note, *Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents*, 30 Am. St. Rep. 376, 401 (1893) ("Nor is a municipality answerable for any wantonness, recklessness, or other wrong committed by a policeman while in the discharge of his duty.")<sup>11</sup>

<sup>10</sup> Long after the enactment of section 1983, state courts continued to recognize that municipalities were immune from suit for the torts of their employees. See, e.g., *Gillmor v. Salt Lake City*, 32 Utah 180, 185 (Utah 1907) (affirming sustaining of demurrer to suit alleging city liable for property damage caused by trespassing police officers; "the allegations of the complaint . . . leave no room for doubt that no cause of action is stated against the city"); *Lynch v. City of North Yakima*, 37 Wash. 657, 661-62, 664 (1905) (affirming sustaining of demurrer to complaint alleging city liable when fire chief failed to warn teamster employee of horse's viciousness); *Nicholson v. City of Detroit*, 129 Mich. 246, 259 (1902) (affirming sustaining of demurrer to suit alleging city liable for negligence of officers in failing to provide employee with workplace safe from disease; "were the plaintiff's action to be sustained, it would overturn the principle upon which nearly all of the cases . . . rest"); *Craig v. City of Charleston*, 180 Ill. 154, 156 (1899) (affirming sustaining of demurrer to suit alleging city liable for unlawful arrest; "the weight of authority . . . is against plaintiff's contention").

<sup>11</sup> See also Edward F. White, *Negligence of Municipal Corporations* § 23 at 29 (1920) ("no private action will lie against a municipal corporation for damages sustained . . . in consequence of the trespasses or misfeasances of its officers or agents in the performance of [a public or governmental] duty") (footnote omitted).

The Forty-Second Congress was well aware of the nature of municipal tort immunity at common law. During the debates, members made "frequent references to cases decided by . . . the Supreme Courts of the several states." *Monell*, 436 U.S. at 669; see also *Owen*, 445 U.S. at 677 (Powell, J., dissenting) (describing Forty-Second Congress as "thoroughly versed in current legal doctrines"). During the Senate debate on the Sherman amendment,<sup>12</sup> Senator Stevenson, an opponent, in "stat[ing] the prevailing law," *Owen*, 445 U.S. at 642, quoted extensively from the discussion of municipal liability in *Prather v. City of Lexington*, 52 Ky. (13 B. Mon.) 559 (1852), to criticize the Sherman amendment's proposed extension of liability. Cong. Globe, 42d. Cong., 1st Sess., 762 (1871) (hereinafter *Globe*). Significantly, in *Prather* the complaint sought to hold the municipality liable for the negligence of its officers in failing to prevent damage to a dwelling caused by a mob. 52 Ky. (13 B. Mon.) at 559. The Kentucky Court of Appeals affirmed the trial court's sustaining of a demurrer to the complaint, concluding that "the present action can not be maintained against the city." *Id.* at 564. The Sherman amendment was, as *Monell* notes, "the only form of vicarious liability presented to [Congress]," 436 U.S. at 692 n. 57 & 693, and would have squarely abrogated the immunity from suit of *Prather*. Its rejection demonstrates that, in enacting section 1983, the Forty-Second Congress could hardly have intended to alter the immunity from suit municipalities enjoyed for the torts of their employees.

In the House, opponents of the Sherman amendment questioned both the constitutional power of Congress to impose duties and obligations on municipalities, see *Globe* at 791 (statement of Rep. Willard); *id.* at 793-94

<sup>12</sup> The Sherman amendment "would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons 'riotously and tumultuously assembled.'" *Monell*, 436 U.S. at 664 (emphasis in original) (citation omitted).

(statement of Rep. Poland), *id.* at 794-95 (statement of Rep. Blair), *id.* at 798 (statement of Rep. Bingham), and the potential financial impact on municipalities. See, e.g., *id.* at 789 (statement of Rep. Kerr) ("How are [cities] to perform their necessary and customary functions if you may send a Federal officer to put his arms into the treasury of the . . . city in this way and withdraw therefrom all the revenues, or if you can authorize the sale of a . . . [building] . . .?"); *id.* at 795 (statement of Rep. Blair) ("If the Government of the United States can [make a city liable for damages occurring in a riot], may it not utterly destroy the municipality?").

Thus, while the Forty-Second Congress, in enacting section 1983, intended to abrogate municipal immunity for those actionable torts when the municipality had itself been "the moving force [behind] the constitutional violation," see *Monell*, 436 U.S. at 694, there is no evidence that the Congress intended to alter the nature of the common law immunity from suit municipalities enjoyed for the torts of their employees. Congress, having viewed the "creation of a federal law of *respondeat superior*" as imposing an unconstitutional "obligation to keep the peace," *id.*, could hardly have intended to transmogrify the common law immunity from suit in such actions into a mere defense to liability. And Congress, in its silence, could hardly have intended to alter the nature of the immunity when doing so would increase the leverage of plaintiffs to obtain settlements—thereby resulting in the *de facto* imposition of the *respondeat superior* liability it explicitly rejected. Cf. *Harris*, 489 U.S. at 392 ("permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability").

Clearly then, Congress, in enacting section 1983, did not alter the nature of the common law immunity enjoyed by municipalities for the torts of their employees. See *Imbler*, 424 U.S. at 418. *Monell's* rule—"that a local



government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents," 436 U.S. at 693-94, is thus more than just a defense to liability. It is instead "an entitlement not to stand trial under certain circumstances." *Mitchell*, 472 U.S. at 525. As such, *Monell* embodies "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question," *id.* at 526, of whether the plaintiff has demonstrated that a municipal policy or custom has caused a violation of constitutional rights.<sup>13</sup>

**B. The Substantial Costs Which Attend Insubstantial Section 1983 Claims Brought Against Local Governmental Entities Require Recognition That *Monell's* Rule States An Immunity From Suit.**

While the intent of the Forty-Second Congress is clear, if this Court declines to follow the historical record it should examine the societal costs attendant with holding that the immunity municipalities retain for the torts of their employees is merely a defense to liability. *See, e.g., Harlow*, 457 U.S. at 813-18. Many of the same societal costs that led this Court to conclude that qualified immunity embodies "an immunity from suit rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, com-

<sup>13</sup> Petitioners mistakenly rely on *Owen v. City of Independence*, 445 U.S. 622 (1980), to argue that "[u]nder Section 1983, local governmental entities are not entitled to assert either an absolute or qualified immunity from suit." Pet. Br. 17. While *Owen* does indeed hold that local governmental entities cannot assert a qualified immunity defense, *see* 445 U.S. at 638, by its own terms *Owen* applies when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," is the proximate cause of the constitutional violation. *Id.* at 657-58 (quoting *Monell*, 436 U.S. at 694). *Owen* is thus applicable only in those suits recognized by *Monell* as stating a valid section 1983 claim against a local government. It does not control when a suit against a local government is based, in reality, on no more than the municipality's having employed a tortfeasor.

pel the same conclusion in analyzing the nature of the immunity which municipalities retain under section 1983 for the torts of their employees. Indeed, section 1983 suits against municipalities entail substantial societal costs beyond those implicated in the qualified immunity context. An assessment of these costs supports the recognition that the immunity of local governmental entities is an immunity from suit and not just a defense to liability.

In *Harlow*, this Court noted that allowing insubstantial claims against government officials to go forward entails significant

social costs includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'

457 U.S. at 814 (citations omitted).

These costs are no less present merely because a municipality rather than one of its officials is the defendant. The expenses of litigation remain; the time and energy of public officials is no less diverted from public issues to defending the municipality against a lawsuit. And although when a municipality is sued the official need not fear personal liability, able citizens are nevertheless deterred from seeking public office by the prospect of spending a significant portion of their time defending their employer from lawsuits.

Suits against a municipal defendant equally dampen the ardor of public officials. As this Court has recognized, the demonstration of the existence of a municipal custom or policy focuses on the decisions of the relevant policy making officials. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). In such cases the munici-

pality and the policy making officials are not severable; when the city is sued, it is the official who bears the brunt of depositions and other broad-reaching discovery. Cf. *Owen*, 445 U.S. at 668-69 (Powell, J., dissenting) ("Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. . . . If officials must look over their shoulders at a strict liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability.") (citations omitted).

Indeed, allowing insubstantial suits against municipalities to proceed to discovery and trial entails additional costs beyond those which this Court has recognized in the qualified immunity context. Allowing such suits to go forward increases the costs of municipalities and imparts the suits with nuisance value. Cf. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 548 (1949) (recognizing that derivative "[s]uits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value"). Confronted with the specter of incurring additional litigation costs and perhaps the risks of trial, municipalities are frequently forced to settle. See Andrew Blum, *Lawsuits Put Strain on City Budgets*, Nat'l L.J., May 16, 1988, at 1, 33 ("the economics of defense [are] such that governments and insurance carriers will settle weak cases") (quoting research paper of Academy for State and Local Government) (hereinafter *City Budgets*). These settlements amount to the *de facto* imposition of the *respondeat superior* liability this Court rejected in *Monell*. Cf. *Harris*, 489 U.S. at 392 ("permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior liability*").

Allowing insubstantial claims to go forward also improperly interjects the federal courts into the affairs of

local governments. Section 1983 "is not a 'federal good government act' for municipalities." *Id.* at 396 (O'Connor, J., concurring). Rather, in the municipal liability context its purpose is limited to providing a cause of action when a municipality has itself caused a violation of constitutional rights. *Id.* Allowing insubstantial claims to go forward not only frustrates Congress's purpose in enacting section 1983, it also ignores the principle of federalism reflected in our constitutional structure. Cf. *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1071 (1992) ("Decisions concerning the allocation of resources to individual programs . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges . . ."); *Harris*, 489 U.S. at 392 (federal courts should not engage "in an endless exercise of second-guessing municipal employee-training programs"); see also *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976).

Municipalities, however, are not alone in bearing the costs of insubstantial section 1983 suits. Since *Monroe*, the federal courts have borne the ever increasing burden of such suits. See *Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting); Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1242 (3d ed. 1988); George C. Pratt, Foreword to Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, And Fees* at vii (ed. 1986). Section 1983 suits against municipalities are very much a part of this litigation explosion. See *City Budgets* at 1 ("[f]rom 1982 to 1985 alone, the number of suits against municipalities jumped 100 percent" and attributing increase to "non-traditional use" of section 1983). Not only are such cases "more burdensome than the average non-civil rights case," Theodore Eisenberg & Stewart Schwab, *The Reality Of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 675 (1987), they are also less successful than non-civil rights cases. See generally *id.* at 678-82 (Even under study's

"broad measure of success, [section 1983] plaintiffs succeed about one-third of the time. . . . By contrast, plaintiffs in contested non-civil rights cases succeed over 80% of the time.") (footnotes omitted). The greater burden imposed by the typical section 1983 case, coupled with the greater likelihood that such cases have no foundation, provides additional justification for imposing a heightened pleading requirement.

In sum, allowing insubstantial claims against municipalities to proceed to discovery and trial imposes significant costs on municipalities,<sup>14</sup> the federal courts, and our constitutional structure. These societal costs compel this Court's recognition that *Monell's* rule "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," 436 U.S. at 694, embodies "an immunity from suit rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526 (emphasis in original).

**C. The Heightened Pleading Standard Is Necessary To Protect A Local Governmental Entity From The Loss Of Its Immunity From Suit And Violates Neither The Notice Pleading Of Rule 8 Nor The Rules Enabling Act.**

The court of appeals' heightened pleading standard protects a local governmental entity from the effective loss of its immunity from suit when a claim is, in reality, based on no more than the entity's having employed a tortfeasor. In *Harlow*, this Court recognized that an immunity from suit embodies an entitlement to not be subjected "either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. Because an immunity from suit is "an entitlement not to stand trial under certain circumstances," *Mitchell*, 472 U.S. at

<sup>14</sup> See *City Budgets* at 32 (discussing survey of National Institute of Municipal Law Officers estimating that "local governments nationwide paid nearly \$2 billion to Sec. 1983 plaintiffs" between 1980 and 1985).

525, which "is effectively lost if a case is erroneously permitted to go" forward, *id.* at 526; it is entirely appropriate to resolve insubstantial claims on either summary judgment or a motion to dismiss prior to discovery. *Id.*; see also *Harlow*, 457 U.S. at 814-818; *Butz v. Economou*, 438 U.S. 478, 507-08 (1978). The heightened pleading rule is an appropriate device for resolving insubstantial claims prior to discovery and vindicates *Monell's* rule "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. As such, the heightened pleading rule violates neither the concept of notice pleading nor the Rules Enabling Act, 28 U.S.C. § 2072(b).

To be sure, as a general matter the Federal Rules of Civil Procedure do not require plaintiffs to set forth specific facts to support their allegations. See Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). In *Conley v. Gibson*, 355 U.S. 41 (1957), this Court acknowledged that:

the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

355 U.S. at 47 (footnote omitted). *Conley*, however, was a suit by bargaining unit members against their union and did not involve any defense of immunity. See generally 355 U.S. at 42-48. As this Court has recognized, when an immunity is present the character of the litigation is substantially changed; the same notice pleading which ordinarily suffices is no longer adequate. See, e.g., *Harlow*, 457 U.S. at 817-18 ("bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery"). As petitioners' complaint demonstrates,



every incident of police misconduct can form the basis of a *Harris* claim if all that is required is a conclusory allegation of the existence of a municipal custom or policy. To allow such suits to go forward on the basis of entirely conclusory allegations would eviscerate *Monell*; the heightened pleading rule thus protects against the loss of the immunity from suit municipalities enjoy for the torts of their employees.

Petitioners also argue that the heightened pleading rule violates the Rules Enabling Act, 28 U.S.C. § 2072(b), because it “abridges and modifies the substantive rights of civil rights litigants.” Pet. Br. 27. According to petitioners, the heightened pleading rule “imposes a burden on civil rights plaintiffs that is impossible to meet” because “the evidence necessary to allege” this element with specificity “is in the exclusive hands of the governmental entity.” Pet. Br. 23-24. In petitioners’ view, the heightened pleading requirement thus impermissibly “add[s] requirements to burden the private litigant beyond what is specifically set forth by Congress.” *Id.* (citation omitted).

This argument is without merit. Its core premise is that, under section 1983, petitioners have an unfettered right to sue local governmental entities. But as demonstrated above, Congress, in enacting section 1983, did not alter the immunity from suit which municipalities enjoyed at common law for the torts committed by their employees. The limitation on petitioners’ right, therefore, is that which inheres in section 1983 itself rather than, as petitioners misleadingly suggest, something imposed by the heightened pleading standard.

Moreover, the Rules Enabling Act applies to the substantive rights of all litigants including municipal defendants; the notice pleading of Rule 8 cannot abridge a municipality’s immunity from suit since it, too, is a substantive right. While it is not always clear whether a particular right is substantive or procedural, under any

definition an “immunity from suit” is a substantive right. An immunity directly affects the right of a plaintiff to recover; an immunity from suit goes even further in not only barring recovery but in barring judicial scrutiny. An immunity thus does not “concern[] merely the manner and the means by which a right to recover . . . is enforced,” it “significantly affect[s] the result of a litigation” by denying the right to recover altogether. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).<sup>15</sup> The right to be free from the burdens of litigation as well as recovery clearly speaks to the substantive rights and duties of the parties and not the judicial process for enforcing any right. See *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941)); see also Black’s Law Dictionary 1429 (6th ed. 1990) (defining “substantive law” as “[t]hat part of the law which creates, defines, and regulates rights and duties of parties, as opposed to ‘ . . . procedural . . . law,’ which prescribes method of enforcing the rights or obtaining redress for their invasion”). When, as here, a defendant retains an “immunity from suit” that will be effectively lost if the defendant is subjected “either to the costs of trial or to the burdens of broad-reaching discovery,” it is the notice pleading of Rule 8 which “abridge[s]” and “modif[ies]” a “substantive right”—that of local governmental entities to be immune from suit. The “heightened pleading” rule, far from imposing a requirement beyond what Congress has authorized, is a necessary mechanism for resolving the conflict between the competing purposes of section 1983—to provide a remedy when a municipality has itself been “the moving force [behind] the constitutional violation”

<sup>15</sup> In this respect, an immunity differs little from a statute of limitations which, as this Court has held for purposes of the *Erie* doctrine, is a matter of substantive right which no federal procedural rule can abridge. See *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34 (1949); see also *Guaranty Trust Co.*, 326 U.S. at 110-12.

without subjecting municipalities to suits solely because they employ a tortfeasor. *Monell*, 436 U.S. at 694.

The "heightened pleading" requirement is also consistent with Fed. R. Civ. P. 11's requirement that a pleading be filed only "after reasonable inquiry," that it be "well grounded in fact," and that it has not been "interposed for any improper purpose." To the extent the "heightened pleading" requirement forces a potential *Harris* plaintiff to develop a factual basis for his allegation of the existence of a municipal policy or custom prior to the filing of the complaint, it imposes no burden beyond that which Rule 11 already requires of all litigants.<sup>16</sup>

To be sure, there may be instances in which, because of the unavailability of pre-complaint discovery, application of the heightened pleading standard may impose a burden on a plaintiff's right to bring a section 1983 action. Petitioners, however, can make no such argument. The opinions of the Texas Attorney General demonstrate that the information necessary to establish the existence of a

<sup>16</sup> Petitioners suggest that Rule 11 sanctions "provide adequate protection to those . . . who might be subjected to 'frivolous' or 'vexatious' claims." See Pet. Br. at 26-27. This suggestion is unavailing because "in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation." Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules 1983 Amendment. Such a post-facto remedy cannot adequately redress the loss of the right to not be subjected "either to the costs of trial or . . . the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18, because the loss of the right entails such significant costs as the distraction of governmental officials from their duties. Indeed, it is for this very reason that the denial of a claim of qualified immunity is immediately appealable under *Cohen's* "collateral order" doctrine. See *Mitchell*, 472 U.S. at 525-30. The nature of the right is such that it cannot be vindicated after the fact. See *id.*; cf. *Abney*, 431 U.S. at 656-62 (denial of double jeopardy claim appealable under *Cohen* doctrine). Finally, as the Advisory Committee has noted, "[e]xperience shows that in practice Rule 11 has not been effective in deterring abuses." Notes of Advisory Committee on Rules 1983 Amendment.

municipal policy of inadequate police training is available under the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1992). See, e.g., Tex. Att'y Gen. Open Records Decision No. 350 (1982) (police internal affairs complaint, final determination and letter advising of disciplinary action available under Open Records Act); Tex. Att'y Gen. Open Records Decision No. 329 (1982) ("[T]he names of complainants who filed formal complaints with the police department's internal affairs division, the name of the officer who is the subject of the complaint, and the final disposition of the complaint by the city police department is public information and is required to be disclosed.").<sup>17</sup> In any event, petitioners have not shown that they made any effort to obtain records under the Open Records Act. Having failed to use the Open Records Act, petitioners cannot now argue in this Court that their substantive right to sue under section 1983 has been "impermissibly abridge[d]" by "an impossible burden." <sup>18</sup> Pet. Br. 24, 27.

<sup>17</sup> Petitioners' oblique suggestion that the "litigation exception" of the Texas Open Records Act, see Pet. Br. 19-20 (citing Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 3(a)(3)), bars pre-complaint discovery also appears to be erroneous. The Texas Attorney General has stated that § 3(a)(3) "does not protect basic facts, the release of which would not impair the governmental body's legal strategy." Tex. Att'y Gen. Open Records Decision No. 397 (1983). It is thus difficult to see how information relating to prior instances of police misconduct could be withheld from petitioners. Moreover, to the extent some information related to prior incidents of police misconduct might not be disclosable if the prior incident is the subject of litigation, the exception may not be invoked after the parties to that litigation have inspected the records in discovery. *Id.*

<sup>18</sup> There may be situations in which the heightened pleading requirement could impose a burden on a section 1983 plaintiff trying to establish the existence of a municipal policy or custom. Such instances may support the creation of a limited exception to allow discovery only on this narrow issue and only when such records cannot be obtained through state or local public records acts or efforts to obtain such records under such acts have been

Thus, as applied by the court of appeals in this case, the "heightened pleading" requirement imposed no burden on petitioners' substantive right to bring suit under section 1983 beyond that which section 1983 itself imposes. By requiring petitioners to show "a pattern of similar incidents in which citizens were injured," Pet. App. 12a-13a, the court of appeals did no more than require them to show that respondents were not entitled to the benefit of their immunity from suit for the torts of their employees. The "heightened pleading" standard thus ensures that every case of police misconduct will not result in a *Harris* suit against the municipality employing the officer. Invalidating the court of appeals' rule will, by contrast, lead to a torrent of *Harris* suits against municipalities merely because they employed police officers who may have committed constitutional torts. The federal courts, local governments, and our constitutional structure can ill afford such a result.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

**RICHARD RUDA \***

Chief Counsel

**JAMES I. CROWLEY**

STATE AND LOCAL LEGAL CENTER

444 North Capitol Street, N.W.

Suite 345

Washington, D.C. 20001

(202) 434-4850

*\* Counsel of Record for the  
Amici Curiae*

October 5, 1992

frustrated. If, after this limited discovery, a plaintiff's amended complaint fails to allege sufficient facts to demonstrate the existence of a custom or policy, dismissal is appropriate.



(14)

No. 91-1657

Supreme Court, U.S.  
FILED

OCT 5 1992

OFFICE OF THE CLERK

IN THE  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1991

---

**CHARLENE LEATHERMAN, et al.,**  
Petitioners,

v.

**TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, et al.,**  
Respondents.

---

On Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

---

**BRIEF AMICI CURIAE FOR THE STATES OF TEXAS,  
ALABAMA, ALASKA, ARKANSAS, CALIFORNIA,  
HAWAII, KANSAS, NORTH DAKOTA,  
PENNSYLVANIA, RHODE ISLAND, SOUTH  
CAROLINA, SOUTH DAKOTA, UTAH, VERMONT,  
VIRGINIA, WEST VIRGINIA, WISCONSIN, WYOMING**

**DAN MORALES** **ILLINOIS, NEVADA** **MARY F. KELLER**  
Attorney General of Texas Deputy Attorney General

**WILL PRYOR** **ADRIAN L. YOUNG**  
First Assistant Attorney General Assistant Attorney General  
Counsel of Record

P. O. Box 12548, Capitol Station  
Austin, Texas 78711 (512) 463-2080

**ATTORNEYS FOR AMICUS CURIAE, STATE OF TEXAS**  
(Other Amici Curiae Counsel Listed in Appendix)

BEST AVAILABLE COPY

## QUESTION PRESENTED

- May a civil rights complaint against a local governmental entity, alleging constitutional violations caused by the entity's failure to adequately train its police officers, be dismissed under FED. R. CIV. P. 12(b)(6) for complaint's failure to satisfy a "heightened pleading" requirement, or is such dismissal prohibited either by the system of "notice pleading" mandated by FED. R. CIV. P. 8 or by the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge, or modify any substantive right?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF THE <i>AMICI CURIAE</i> .....	2
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I.    THE SUBSTANTIVE DEFENSE OF QUALIFIED IMMUNITY REQUIRES FACT SPECIFIC PLEADING IN ACCORDANCE WITH THE RULES ENABLING ACT, 28 U.S.C. § 2072(b). .....	4
II.   MUNICIPAL IMMUNITY AND PUBLIC POLICY CONSIDERA- TIONS JUSTIFY A FACT SPECIFIC PLEADING STAND- ARD IN A § 1983 CLAIM AGAINST A MUNICIPALITY. ....	11
CONCLUSION .....	15

## TABLE OF AUTHORITIES

Cases	Page
<i>Anderson v. Creighton</i> , 483 U.S. 635, 107 S. Ct. 3034 (1987).....	<i>passim</i>
<i>Bergquist v. County of Cochise</i> , 806 F.2d 1364 (9th Cir. 1986).....	4
<i>Brower v. County of Inyo</i> , 489 U.S. 593, 109 S. Ct. 1378 (1989).....	12
<i>City of Canton, Ohio v. Harris</i> , 489 U.S. 379, 109 S. Ct. 1197 (1989) .....	11,12,13,15
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808, 105 S. Ct. 2427 (1985).....	14
<i>Collins v. City of Harker Heights, Texas</i> , ___ U.S. ___, 112 S. Ct. 1061 (1992).....	6,12,13
<i>Davis v. Scherer</i> , 468 U.S. 183 (1984).....	6
<i>Elliott v. Perez</i> , 751 F.2d 1472 (5th Cir. 1985) .....	<i>passim</i>
<i>Elliott v. Thomas</i> , 937 F.2d 338 (7th Cir. 1991), <i>cert. denied sub nom. Propst v. Weir</i> , 112 S. Ct. 973 (1992).....	4
<i>Freedman v. City of Allentown</i> , 853 F.2d 1111 (3rd Cir. 1988) .....	4
<i>Graham v. Connor</i> , 490 U.S. 386, 109 S. Ct. 1865 (1989).....	8
<i>Haines v. Kerner</i> , 404 U.S. 519, 92 S. Ct. 594 (1972) ...	8



## TABLE OF AUTHORITIES, CONTINUED

Cases	Page
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S. Ct. 2727 (1982).....	<i>passim</i>
<i>Hobson v. Wilson</i> , 737 F.2d 1 (D.C. Cir. 1984), <i>cert. denied sub nom. Brennan v. Hobson</i> , 470 U.S. 1084 (1985).....	10
<i>Hunter v. Bryant</i> , ___ U.S. ___, 112 S. Ct. 534 (1991).....	5,8
<i>Lion Boulos v. Wilson</i> , 834 F.2d 504 (5th Cir. 1987).....	7,14
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) .....	6,9
<i>Martin v. D.C. Metropolitan Police Dept.</i> , 812 F.2d 1425 (D.C. Cir. 1987).....	4
<i>Marx v. Gumbinner</i> , 855 F.2d 783 (11th Cir. 1988) .....	5
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	6,7,12
<i>Monell v. New York City Dept. of Social Services</i> , 436 U.S. 658, 98 S. Ct. 2018 (1978) .....	11,14
<i>Monroe v. Pape</i> , 365 U.S. 167, 81 S. Ct. 473 (1961) ....	14
<i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247, 101 S. Ct. 2748 (1981).....	12
<i>Nuclear Transport &amp; Storage, Inc. v. United States</i> , 890 F.2d 1348 (7th Cir. 1989).....	4

## TABLE OF AUTHORITIES, CONTINUED

Cases	Page
<i>Owen v. City of Independence</i> , 455 U.S. 622, 100 S. Ct. 1398 (1980).....	11,14
<i>Palmer v. City of San Antonio</i> , 810 F.2d 514 (5th Cir. 1987).....	2,4
<i>Pueblo Neighborhood Health Centers v. Losavio</i> , 847 F.2d 642 (10th Cir. 1988).....	4
<i>Siebert v. Gilley</i> , ___ U.S. ___, 111 S. Ct. 1789 (1991).....	6,7,9,10
<i>Spears v. McCotter</i> , 766 F.2d 179 (5th Cir. 1985) .....	8
<i>Watson v. Ault</i> , 525 F.2d 886 (5th Cir. 1976).....	7
<i>Wilson v. Seiter</i> , ___ U.S. ___, 111 S. Ct. 2321 (1991) ..	8
<i>Wyatt v. Cole</i> , ___ U.S. ___, 112 S.Ct. 1827 (1992) .....	12
<b>Constitutions, Statutes and Rules</b>	
28 U.S.C. § 2072(b).....	10
42 U.S.C. § 1983 .....	<i>passim</i>
FED. R. CIV. P. 8 .....	2
FED. R. CIV. P. 12(b)(6).....	7
FED. R. CIV. P. 56.....	7

## TABLE OF AUTHORITIES, CONTINUED

Miscellaneous	Page
Blaze, <i>Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation</i> , 31 WM. & MARY L. REV. 935 (1990).....	11
Comment, <i>Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation</i> , 95 YALE L.J. 126 (1985).....	7
Kinports, <i>Qualified Immunity in Section 1983 Cases: The Unanswered Questions</i> , 23 GEORGIA L. REV. 597, 658 (1989).....	14

No. 91-1657

---

IN THE  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1991

---

CHARLENE LEATHERMAN, *et al.*,  
Petitioners,

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE  
AND COORDINATION UNIT, *et al.*,  
Respondents.

---

On Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

---

BRIEF AMICI CURIAE FOR THE STATES OF  
TEXAS, ALABAMA, ALASKA, ARKANSAS,  
CALIFORNIA, HAWAII, KANSAS, NORTH DAKOTA,  
PENNSYLVANIA, RHODE ISLAND,  
SOUTH CAROLINA, SOUTH DAKOTA, UTAH,  
VERMONT, VIRGINIA, WEST VIRGINIA,  
WISCONSIN, WYOMING

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

### INTEREST OF THE *AMICI CURIAE*

The various *amici* states have an abiding interest in this case because this Court's decision on the pleading standard before it could have a great effect on the way all circuits require a plaintiff to plead a civil rights case where immunity is an issue. The *amici* states, through their various attorneys general, provide legal representation to state officials who are sued by individuals for violation of their civil rights under 42 U.S.C. § 1983. The fact specific pleading standard being challenged before this Court was mandated by the Fifth Circuit to be applied to suits against individual state officials who were entitled to the defense of immunity, qualified or absolute. See *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). At this point, some circuits require heightened pleading in this context and some specifically do not. All of the *amici* states believe that the heightened pleading requirement is a necessary adjunct to effectuate the substantive defenses of qualified and absolute immunity. The Fifth Circuit extended the *Elliott* standard to municipalities without explanation in *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). However, the substantive bases for applying the heightened pleading requirement differ in the contexts of qualified immunity and municipal immunity. Because the *amici* states believe in the correctness of the *Elliott* standard, we urge this Court to affirm the judgment below.

### SUMMARY OF ARGUMENT

1. The fact specific pleading requirement is a mechanism for effectuating the substantive defense of qualified immunity; it is not a rule of procedure. While the requirement is a departure from the notice pleading concept embodied in FED. R. CIV. P. 8, it assists the courts in determining questions of

immunity prior to the debilitating processes of discovery and trial, activities the qualified immunity defense was specifically designed to avoid. This Court in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) stated that "the contours of the [clearly established] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Without detailed factual pleadings stripped of conclusory labels, the trial judge will be unable to evaluate the "objective legal reasonableness" standard which is the "touchstone" of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Because immunity must be addressed as a threshold issue, the fact specific pleading requirement goes to the very heart of the immunity doctrine.

2. Municipal immunities differ both conceptually and procedurally from the immunities available to individual state officials. However, many of the same policy issues apply, such as expenses of litigation and diversion of official energy from pressing public issues. As the resources of local government are not inexhaustible, endless fishing expeditions by private litigants and federal judicial second-guessing of municipal employee-training programs should be discouraged unless plaintiffs state specifically the information giving rise to their belief that they may have a cause of action against a municipality. Although municipalities are not entitled to the same sort of immunities available to individual public officials, the fact specific pleading requirement protects existing municipal immunities and diverts insubstantial claims from the litigation process. Thus, fact specific pleading in the context of municipal immunities does not enlarge the substantive rights available to municipalities.



## ARGUMENT

### I. THE SUBSTANTIVE DEFENSE OF QUALIFIED IMMUNITY REQUIRES FACT SPECIFIC PLEADING IN ACCORDANCE WITH THE RULES ENABLING ACT, 28 U.S.C. § 2072(b).

The questions presented in this case go to a Fifth Circuit requirement of fact specific pleading when alleging a cause of action pursuant to 42 U.S.C. § 1983 against a local government. See *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987) (heightened pleading requirement extended to municipalities without explanation). Petitioners claim that the requirement of fact specific pleading violates Rule 8 of the Federal Rules of Civil Procedure and its mandate that a litigant need only make a short and plain statement of his claim, along with the Rules Enabling Act's stricture that rules of practice and procedure shall not abridge, enlarge, or modify any substantive right. The Fifth Circuit's first detailed analysis and rationale for fact specific pleading appeared in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) and arose in the context of the individual immunity defense.<sup>1</sup> Individuals sued under § 1983 generally are entitled to

<sup>1</sup> Some circuits have declined to adopt an *Elliott* rationale, some circuits specifically have adopted it, and some have done both. See, e.g., *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1435 (D.C. Cir. 1987) (using *Elliott* as support of the D.C. Circuit's heightened pleading requirement); *Freedman v. City of Allentown*, 853 F.2d 1111, 1114-15 (3rd Cir. 1988) (heightened pleading required); *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied sub nom. *Propst v. Weir*, 112 S. Ct. 973 (1992) (declining to follow *Elliott* because the right not to be tried is "procedural," not "substantive."); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 4348, 13 (7th Cir. 1989) (*Elliott* specifically applied to *Bivens* claims because of qualified immunity issue); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1367 (9th Cir. 1986) (heightened pleading requirement of *Elliott* specifically rejected for Ninth Circuit purposes); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642,

the substantive defense of immunity, qualified or absolute. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982). In order to overcome the defense of qualified immunity, the defendant official's conduct must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S. Ct. 3034, 3042 n.6 (1987). The government official's liability generally turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Anderson*, 483 U.S. at 639, 107 S. Ct. at 3038-39. The law must have been sufficiently clear so as to put the government official on notice that his actions were improper. *Id.*

The interaction between the substantive defense of qualified immunity and the procedural rule which requires only a general statement of a plaintiff's claim brings about "an exquisite confrontation."

[O]n the one hand, defendants enjoy an immunity from suit which reaches beyond trial and protects them from the debilitating processes of discovery; on the other hand, the notice pleading concepts rest on the acceptance of the idea that one may sue now and discover later what his claim is.

*Elliott*, 751 F.2d at 1482-83 (Higginbotham, J., concurring).

Because the immunity issue must be resolved at the earliest possible stage in the litigation process, *Hunter v. Bryant*,

648-49 (10th Cir. 1988) (citing *Elliott* in support of rationale requiring fact specific pleading when qualified immunity is an issue); *Marx v. Gumbinner*, 855 F.2d 783, 788-89 (11th Cir. 1988) (does not specifically adopt heightened pleading requirement, but cites *Elliott* in support of requiring stricter scrutiny of plaintiff's § 1983 complaint against a government official).

\_\_\_ U.S. \_\_\_, \_\_\_, 112 S. Ct. 534, 536 (1991), citing *Harlow*, 457 U.S. at 818; *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. at 646 n.6, the fact specific pleading issue goes to the very heart of the immunity doctrine. To achieve the fundamental substantive objectives of immunity, *Elliott* presents a two-step process. First, in cases invoking § 1983, the claimant is required to state specific facts, not merely conclusory allegations. *Elliott*, 751 F.2d at 1479. Second, district courts must determine as a threshold issue whether these pleadings are sufficiently detailed to defeat immunity. *Id.*, at 1480.

In resolving issues of qualified immunity, *Anderson* expressly recognized that "objective legal reasonableness" is overcome only by an articulation of facts that demonstrate a violation of specific legal principles. That is, the "clearly established right" must be identified in a more than abstract fashion. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. *Elliott's* requirement of detailed factual pleadings stripped of conclusory labels enables the trial judge to evaluate a plaintiff's claim within the objective legal reasonableness standard that is the "touchstone" of *Harlow*. *Id.*, 483 U.S. at 639, 107 S. Ct. at 3039. *Anderson* ratifies this requirement and admonishes that immunity must be addressed as a threshold issue prior to discovery. *Id.*, at n.2.

Before the trial court addresses a defendant's claim of qualified immunity, however, it must determine whether a plaintiff has asserted a violation of any constitutional right. *Siebert v. Gilley*, \_\_\_ U.S. \_\_\_, \_\_\_, 111 S. Ct. 1789, 1793 (1991); cf. *Collins v. City of Harker Heights, Texas*, \_\_\_ U.S. \_\_\_, \_\_\_, 112 S. Ct. 1061, 1068 (1992) (municipal liability may attach under limited circumstances when underlying constitutional tort by a city employee occurs). If a plaintiff has not adequately asserted violation of a constitutional right, a trial

court need not further address the question of qualified immunity. In order to resolve these legal issues as a threshold matter, then, a court must consider the factual allegations making up the plaintiff's claim for relief, normally either on defendant's motion to dismiss or for summary judgment. *Mitchell*, 472 U.S. at 527-28, 105 S. Ct. at 2816.

The application of this threshold inquiry has caused some confusion in the several circuits because while the *Harlow* court suggested that the qualified immunity analysis take place on a motion for summary judgment, at the same time it prohibited discovery until the immunity question is resolved. See *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815 ("[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery). See also *Anderson*, 483 U.S. at 646 n.6, 107 S. Ct. at 3042 n.6 (confirms no discovery unless plaintiff's well-pleaded complaint contains disputed material allegations; then if discovery is necessary, it is limited to issue of immunity) (emphasis added); *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987) (holding essentially the same as *Anderson*). Without the factual development through discovery presupposed by the concept of notice pleading, the more appropriate procedural mechanism for qualified immunity determinations may be Rule 12(b)(6), not Rule 56. If a defendant wished to attach evidence outside the pleadings, such as an affidavit, the court could treat the motion to dismiss based upon qualified immunity alternatively as a motion for summary judgment pursuant to Rule 12(c). See Comment, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 144-45, n.72 and n.73 (1985). The court also has the option of requiring a more definite statement from the plaintiff.<sup>2</sup> See also *Siebert*, 111 S. Ct. at 1795 (plaintiff must

<sup>2</sup> See *Elliott*, 751 F.2d at 1482 and 1482 n.25. In cases involving *pro se* plaintiffs, the Fifth Circuit has approved the use of a questionnaire to flesh out a *pro se* prisoner complaint. *Watson v. Ault*, 525 F.2d 886 (5th Cir.



plead fact specific allegations once the qualified immunity defense has been asserted) (Kennedy, J., concurring).

Analysis of a plaintiff's claim under the objective standard of qualified immunity is also often complicated by the fact that a material element in many § 1983 cases is the subjective intent of the defendant official. The element of subjective intent stands outside the qualified immunity defense,<sup>3</sup> which to overcome formerly required an allegation of malice. *Harlow*, 457 U.S. at 817-18, 102 S. Ct. at 2738 ("bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" and therefore qualified immunity shall be an objective standard). For instance, in claims alleging violation of the eighth amendment, a plaintiff must plead either deliberate indifference or malice depending on the nature of his claim. *Wilson v. Seiter*, \_\_\_ U.S. \_\_\_, \_\_\_, 111 S. Ct. 2321, 2324 (1991).

Even claims which do not depend upon the subjective intent of the defendant official, such as claims under the fourth amendment, require a factual context within which an alleged constitutional violation is measured. *Hunter v. Bryant*, 112 S. Ct. at 537 ("the court should ask whether the agents acted reasonably under settled law in the circumstances"); *Graham v. Connor*, 490 U.S. 386, 393-397, 109 S. Ct. 1865, 1870-72 (1989); *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3039 ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have

---

1976). The Fifth Circuit has also approved the use of evidentiary hearings to develop factual bases in the same circumstances. *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). The purpose of *Spears* hearings is in the nature of a more definite statement, not to establish controverted facts. *Id.* Thus, the admonition of *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972), that *pro se* complaints be read liberally, is met through the active participation of the district judges and state institutions.

<sup>3</sup> See, e.g., *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring) ("Here malice is a requisite showing to avoid the bar of qualified immunity.")

believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed."); *Malley v. Briggs*, 475 U.S. at 345, 106 S. Ct. at 1098 ("the [] question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant"). If conclusory allegations suffice to state a constitutional violation, the protections afforded by the immunity defense will be abrogated in the very manner *Harlow* and *Anderson* sought to avoid. A court must determine whether plaintiff has asserted a violation of any constitutional right; if such an assertion is made, it must address whether that right is "clearly established" under the facts and circumstances of the case. *Siegert*, 111 S. Ct. at 1793. Thus, in order to effectuate the substantive defense of qualified immunity, the factual elements of plaintiff's claim must appear on the face of his complaint with enough particularity that the judge may conduct this two-part threshold inquiry.

The inherent tension between the fact specific pleading requirement and Rule 8 defeats neither. As the Fifth Circuit stated in *Elliott*:

The public goals sought by official immunity are not procedural. Indeed, they go to very fundamental substantive objectives. To the extent that F. R. Civ. P. 8 and the practices under it present any conflict, the trial court must find a way to adapt its procedures to assure full effectuation of this substantive right, since the Enabling Act provides that the rules shall not abridge, enlarge or modify any substantive right.

*Elliott*, 751 F.2d at 1479.

This Court has also recognized this tension:



The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

*Siebert*, 111 S. Ct. at 1795 (Kennedy, J., concurring).<sup>4</sup>

Because "the substantive defense of immunity controls," the fact specific pleading standard is a judicial solution to effectuate the immunity defense in a civil rights claim. As Judge Higginbotham stated in *Elliott*:

We must solve judicial problems, and we must not solve legislative problems. My effort has been to demonstrate that it is a judicial problem - - defining the content of immunity -- that we face here.

751 F.2d at 1483.

The fact specific pleading requirement is not a substantive right itself, nor is it a judicial amendment to the Federal Rules of Civil Procedure. Rather, it is a mechanism which allows the immunity defense to be realized, in accordance with the formative principles of the Rules Enabling Act, 28 U.S.C. § 2072(b). It is not a technical rule which exists independently from the substantive right with which it is associated, a factor upon which petitioners' entire argument

<sup>4</sup> In fact, every circuit has found occasion to require at least a minimum of factual specificity when pleading a civil rights complaint. See *Hobson v. Wilson*, 737 F.2d 1, 30 n.87 (D.C. Cir. 1984), cert. denied sub nom. *Brennan v. Hobson*, 470 U.S. 1084 (1985) (listing cases).

relies.<sup>5</sup> Fact specific pleading assists the district court in no less an objective than "avoid[ing] excessive disruption of government and permit[ing] the resolution of [] insubstantial claims." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738.

## II. MUNICIPAL IMMUNITY AND PUBLIC POLICY CONSIDERATIONS JUSTIFY A FACT SPECIFIC PLEADING STANDARD IN A § 1983 CLAIM AGAINST A MUNICIPALITY.

Petitioners argue that the heightened pleading requirement abridges their remedial rights under § 1983 in cases where the evidence necessary to meet that requirement rests exclusively within the control of a municipal defendant who is immune from discovery. Their argument implies that this is peculiarly true with respect to municipal employee training programs or data which may establish a pattern. Moreover, petitioners claim that the "procedural" rule of heightened pleading impermissibly enlarges the substantive rights of municipal defendants by granting them the functional equivalent of absolute or qualified immunity. While it is well settled that municipal defendants may not claim absolute or qualified immunity, it is also well settled that municipalities do enjoy immunity from vicarious or *respondeat superior* liability. *Owen v. City of Independence*, 455 U.S. 622, 100 S. Ct. 1398 (1980) (no absolute or qualified immunity for municipalities, but recognizing that "certain rather complicated municipal tort immunities existed at the time § 1983 was enacted"), *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978) (municipalities immune from *respondeat superior* liability). See also *City of Canton, Ohio v. Harris*, 489 U.S. 379, 109 S. Ct. 1197 (1989) (municipalities immune from

<sup>5</sup> See generally *Blaze, Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990).

liability under a failure to train theory when the failure to train amounts to something less than deliberate indifference); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981) (municipalities immune from punitive damages). Municipalities may be liable when a plaintiff can show that the municipality itself caused the harm.<sup>6</sup> See *Collins v. City of Harker Heights*, 112 S. Ct. at 1066-67.

Municipal immunity is conceptually different from the qualified immunity announced in *Harlow*, because qualified immunity protects an individual from suit, not just from liability. See *Wyatt v. Cole*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1827 (1992) (all three separate opinions discuss historical development of immunity doctrine). Municipal immunity is also procedurally different because qualified immunity allows for an official's interlocutory appeal upon its denial. *Mitchell v. Forsyth*, 472 U.S. at 530, 105 S. Ct. at 2817. However, many of the same policy issues which inform the qualified immunity defense also inform municipal immunities. For instance, the *Harlow* court listed various social costs attending suits against public officials: "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. at 814, 102 S. Ct. at 2736. The first two concerns also apply in a municipal immunity context, for as Justice O'Connor stated in her concurring opinion in *City of Canton, Ohio*, "the resources of local government are not inexhaustible." 489 U.S. at 400, 109 S. Ct. at 1210. Additionally, municipalities have not been excluded from dealing with numerous insubstantial claims. Cf. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738.

<sup>6</sup> Petitioners assert that this Court held that the plaintiffs in *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378 (1989) adequately stated a claim against a local government despite the Ninth Circuit's qualification that plaintiffs' complaint contained little more than bare conclusions. This Court, however, did not address the issue of local governmental or municipal immunity; it addressed the definition of "seizure." 489 U.S. at 598-599, 109 S. Ct. at 1383.

Unless a plaintiff is required to state particular facts giving rise to her conclusion that a municipality has an inadequate training policy, then she may as a matter of routine allege a failure to train on top of the underlying constitutional violation.<sup>7</sup> This may result in "*de facto respondeat superior* liability on municipalities [] . . . and engage federal courts in an endless exercise of second-guessing municipal employee-training programs." *City of Canton, Ohio*, 489 U.S. at 392, 109 S. Ct. at 1206 ("This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism."). The heightened pleading standard as applied to municipal immunities, then, is not just designed to weed out insubstantial or frivolous claims but is rooted in basic principles of federalism and fair notice. See *id.*, 489 U.S. at 389-392 and 395-398, 109 S. Ct. at 1205-06 and 1208-09. Valuable government resources may be drained from an endless series of

<sup>7</sup> See *Collins v. City of Harker Heights, Texas*, 112 S. Ct. at 1068 concerning the holding of *Canton*:

[W]e concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. In particular, we held that the inadequate training of police officers could be characterized as the cause of the constitutional tort if -- and only if -- the failure to train amounted to "deliberate indifference" to the rights of persons with whom the police come into contact. . . . We assume for the purpose of decision [in this case] that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents . . .

It should be noted that in the instant case, the individual police officers sued by the Andert and Lealos petitioners have already stood a jury trial in a separate cause of action where no liability for constitutional violations was found. Under the holding of *Collins*, then, the Lealos and Andert petitioners should be barred from pressing their failure to train claims against any of the local government respondents.

fishing expeditions by private litigants in an ever increasingly litigious society. Cf. *Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GEORGIA L. REV. 597, 658 (1989). This is especially true because municipalities do not have the right to interlocutory appeal. It is ironic that the very individuals upon whom a municipality's liability will be predicated may pursue their right to interlocutory appeal while the municipality remains in the district court. At least municipalities should have the benefit of the fact specific pleading requirement.<sup>8</sup>

Thus, the heightened pleading standard does not enlarge a municipal defendant's substantive rights. It is a judicial response created out of concern for protecting existing substantive municipal immunities and for the various public policy considerations outlined above, balanced with the remedial rights of plaintiffs under § 1983. It is especially important to be cautious given the vast changes in municipal liability since 1961. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) (municipalities are not "persons" for purposes of §1983 and they are absolutely immune from liability); *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037 (municipalities are "persons" for purposes of § 1983, but are not liable under *respondeat superior*); *Owen*, 445 U.S. at 650, 100 S. Ct. at 1415 (municipalities are persons for § 1983 purposes but are not entitled to qualified or absolute immunity); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 810, 105 S. Ct. 2427, 2429 (1985) (full contours of municipal

<sup>8</sup> Judge Goldberg's concern for the ability of plaintiffs to plead fact specifically in the context of municipal immunity, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1060 (5th Cir. 1992) (Goldberg, J., concurring specially), may be addressed by allowing limited discovery under the same circumstances allowed in the context of qualified immunity. That is, discovery may be strictly tailored to gathering information necessary to enable a plaintiff to plead with the required specificity. The district court need not sanction the sort of broadly based invasive discovery constituting a disruption of government. The petitioners failed to request this sort of limited discovery below despite the rule of *Lion Boulos v. Wilson*, *supra*.

immunity not developed and this case is only a small step in that direction); *City of Canton, Ohio*, 489 U.S. at 396, 109 S. Ct. at 1203 (acknowledging the difficulties the court has had in defining the scope of municipal liability).

## CONCLUSION

Accordingly, the *amici* states respectfully urge this Court to affirm the judgment below.

Respectfully submitted,

DAN MORALES  
Attorney General of Texas

WILL PRYOR  
First Assistant Attorney General

MARY F. KELLER  
Deputy Attorney General

MICHAEL P. HODGE  
Assistant Attorney General  
Chief, Enforcement Division

\**Counsel of Record*

ADRIAN L. YOUNG\*  
Assistant Attorney General

SHARON FELFE  
Assistant Attorney General

ANN KRAATZ  
Assistant Attorney General



P. O. Box 12548, Capitol Station  
Austin, Texas 78711  
(512) 463-2080  
Fax No. (512) 463-2084

**ATTORNEYS FOR  
*AMICI CURIAE***

(Additional Counsel Listed in  
Appendix)

**APPENDIX**

**ADDITIONAL COUNSEL FOR *AMICI CURIAE***

**State of Alabama**

Hon. Jimmy Evans  
Attorney General of Alabama  
State House  
11 South Union Street  
Montgomery, Alabama 36130

**State of Alaska**

Hon. Charles E. Cole  
Attorney General of Alaska  
State Capitol  
P. O. Box 110300  
Juneau, Alaska 99811-0300

**State of Arkansas**

Hon. Winston Bryant  
Attorney General of Arkansas  
200 Tower Building  
323 Center Street  
Little Rock, Arkansas 72201

**State of California**

Hon. Daniel E. Lungren  
Attorney General of California  
Suite 511, 1515 K Street  
Sacramento, California 95814

**State of Hawaii**

Hon. Robert A. Marks  
Attorney General of Hawaii  
425 Queen Street  
Honolulu, Hawaii 96813

**State of Kansas**

Hon. Robert T. Stephan  
 Attorney General of Kansas  
 Judicial Center, Second Floor  
 Topeka, Kansas 66612

**State of North Dakota**

Hon. Nicholas J. Spaeth  
 Attorney General of North Dakota  
 State Capitol  
 600 East Boulevard Avenue  
 Bismark, North Dakota 58505

**State of Pennsylvania**

Hon. Ernest D. Preate, Jr.  
 Attorney General of Pennsylvania  
 Strawberry Square  
 16th Floor  
 Harrisburg, Pennsylvania 17120

**State of Rhode Island**

Hon. James E. O'Neil  
 Attorney General of Rhode Island  
 72 Pine Street  
 Providence, Rhode Island 02903

**State of South Carolina**

Hon. T. Travis Medlock  
 Attorney General of South Carolina  
 Rembert Dennis Office Building  
 1000 Assembly Street  
 Columbia, South Carolina 29211

**State of South Dakota**

Hon. Mark Barnett  
 Attorney General of South Dakota  
 500 E. Capitol  
 Pierre, South Dakota 57501-5070

**State of Utah**

Hon. Paul Van Dam  
 Attorney General of Utah  
 State Capitol, Room 236  
 Salt Lake City, Utah 84114

**State of Vermont**

Hon. Jeffrey L. Amestoy  
 Attorney General of Vermont  
 Pavilion Office Building  
 Montpelier, Vermont 05602

**State of Virginia**

Hon. Mary Sue Terry  
 Attorney General of Virginia  
 5th Floor  
 101 North 8th Street  
 Richmond, Virginia 23219

**State of West Virginia**

Hon. Mario J. Palumbo  
 Attorney General of West Virginia  
 Main Capitol Building, Room E-26  
 Charleston, West Virginia 26305

**State of Wisconsin**

Hon. James E. Doyle  
 Attorney General of Wisconsin  
 P. O. Box 7857  
 Madison, Wisconsin 53707-7857

**State of Wyoming**

Hon. Joseph B. Meyer  
 Attorney General of Wyoming  
 123 State Capitol  
 Cheyenne, Wyoming 82002